122-625

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886

No. 248. 16

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND HOMER A. HOLT, JUDGE OF THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA, PLAINTIFFS IN ERROR,

*vs.*

A. E. WHITE, ADMINISTRATOR OF JOHN D. WHITE, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE WEST VIRGINIA.

FILED JULY 30, 1883.

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1 & 2 *Upon a Petition for Mandamus.*

Supreme Court of Appeals of West Virginia, Wheeling.

A. E. WHITE, Adm'r, Petitioner,
*against*
Hon. H. A. HOLT, Judge, &c., and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendants.

Judges: Hon. Okey Johnson, president; Hon. T. C. Green, Hon. A. C. Snyder, Hon. Sam'l Woods; O. S. Long, clerk.

3 Supreme Court of Appeals of West Virginia.

A. E. WHITE, Adm'r,
*vs.*
THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

Pleas and proceedings before the supreme court of appeals of West Virginia.

WEST VIRGINIA, *To wit:*

At a supreme court of appeals held in Wheeling, in Ohio county, on the 14th day of October, 1882, this day came A. E. White, administrator of John D. White, deceased, by A. F. Mathews, Esq., his attorney, and presented a petition for a writ of mandamus to be directed to the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, requiring him to proceed with the trial of a certain action of trespass on the case in which the said petitioner is plaintiff and the Chesapeake & Ohio Railway Company is defendant "just as other causes on the trial docket of said circuit court are disposed of, or else to show cause why he has not done so," with
4 a duly certified transcript of the record of said cause accompanying the petition, which being seen and inspected by the court, a rule is awarded to be directed to the Hon. Homer A. Holt, judge of the circuit of Greenbrier county, returnable on the tenth day of the next regular term of this court, to be held in Charleston, in the county of Kanawha, requiring him to show cause, if any he can, why a peremptory writ of mandamus requiring him to proceed with the trial of said cause should not issue. And it is further ordered that service of a duly attested copy of this order shall be considered service of the rule aforesaid, and that a copy of this order be served upon the Chesapeake and Ohio Railway Company.

A copy from the record.
Attest: O. S. LONG, *Clerk.*

Copies of this order were made, executed, and returned, with the following endorsements:

Service of the within rule accepted.
Dec. 2, '82.

H. A. HOLT.

Service acknowledged for the Chesapeake and Ohio Railway Co. Dec. 4, 1882.

WM. H. HOGEMAN, *Att'y.*

The petition and transcript of record accompanying the petition above referred to are as follows:

*Petition.*

To the honorable the judges of the supreme court of appeals of West Virginia:

Your petitioner, A. E. White, adm'r of John D. White, dec'd, respectfully represents that heretofore, on the 17th day of September, 1881, in the circuit court for the county of Greenbier, he instituted an action of trespass on the case against the Chesapeake and Ohio Railway Company, and such proceedings were taken in said
5 action that at rules, in the clerk's office of said court, on the first Monday in November, 1881, the judgment theretofore entered in said office in favor of your petitioner was confirmed, and said action was placed upon the office judgment docket of said court for the November term, 1881, at which term it was ready for trial; that at said November term, 1881, the said defendant, by its attorney, appeared and demurred generally to your petitioner's declaration, in which demurrer your petitioner joined, and said cause was then continued to the next term, and at said next term, on the 18th day of April, 1882, the defendant presented its petition, accompanied by a bond, praying for the removal of said action to the district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit court powers, to the filing of which petition and bond your petitioner objected, and the court having considered said objection, after argument by counsel, sustained it, refused to allow said petition and bond to be filed, and also refused to remove said cause, as prayed for in said petition, for the reason that said petition and bond were not presented in time, because, in the opinion of the court, the said April term was not the first term at which said cause could be tried, thereby holding, and as your petitioner is advised holding correctly, that the said circuit court for the county of Greenbrier alone had jurisdiction of said action, and that the said district court of the United States was not entitled to and could not take jurisdiction thereof, and that any judgment which it might undertake to render in the premises would be a nullity. And at said April term the said court overruled said demurrer to the plaintiff's declaration, and also overruled a motion by the defendant made to quash the writ issued in said action, and sustained an objection made to a special plea tendered by the defendant and refused to allow it to be filed; and thereupon the defendant pleaded the general issue, upon which issue was joined, and then, upon motion of defendant and at its costs, the said action was continued.

Further complaing, your petitioner represents that at the June

term, 1882, the Hon. Homer A. Holt, the judge of said court,
6 presiding, he moved said court to proceed with the trial of said cause, which motion the defendant resisted upon the ground and for the reason that since the preceding April term of said court a transcript of the record of the proceedings had been taken to the district court of the United States for the district of West Virginia, and that said cause had been there regularly docketed; and the court being satisfied that the facts thus stated and relied upon in support of said objection were true, upon the grounds and for the reasons thus alleged by the defendant, and for that reason alone declined and refused to proceed further with said cause. To which ruling and decision of the court your petitioner then excepted. All of which will fully appear from a transcript of the record of the proceedings in said action, properly certified and authenticated, herewith filed, and which it is asked may be taken and read as a part of this petition.

By this last order and ruling, at the June term, 1882, your petitioner feels greatly aggrieved, as its effect is to refuse him a trial in a court, and the only court, as said court itself has decided, which has jurisdiction of his action, and to drive him for relief and for a trial, if one is to be had at all, to a court which is not entitled to and cannot take jurisdiction, and where judgment, should it undertake to render one, would be a nullity, as has been held, as already stated, by the very court which now refuses to proceed further; so that, if this refusal is persisted in and is not overcome, he will be left wholly without remedy.

In consideration of the premises your petitioner prays that a mandamus may be awarded to the said Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, to be directed, requiring and commanding him to proceed with the trial of said cause just as other causes on the trial docket of said court are disposed of, or else to show cause why he has not done so; and that upon default in such cause being shown the said mandamus be made peremptory,
commanding him to proceed with the trial of said cause as
7 aforesaid. And as in duty bound your petitioner will ever pray, &c.

A. E. WHITE,
*Adm'r of John D. White, dec'd, by Counsel.*
ALEX. G. MATTHEWS, *Atto.*

Rule in mandamus awarded in court at Wheeling Oct. 14, 1882.
Attest: O. S. LONG, *Clk.*

*Record.*

WEST VIRGINIA:

Pleas before the circuit court of Greenbrier county on the 29th day of June, 1882.

Be it remembered that heretofore, to wit, on the 17th day of September, 1881, came A. E. White, administrator of John D. White, dec'd, and sued out of the clerk's office of the said court a writ of

summons against the Chesapeake and Ohio Railway Company, which writ, with the return thereon made, is in the words and figures following:

*Summons.*

State of West Virginia to the sheriff of Greenbrier county, Greeting:

We command you that you summon the Chesapeake and Ohio Railway Company, if it be found within your bailiwick, to appear before the judge of our circuit court for the said county, at the clerk's office of our said court, at rules to be held for said court on the first Monday in October next, to answer A. E. White, administrator of John D. White, dec'd, of a plea of trespass on the case; damages, $15,000. And have then [and] there this writ.

Witness Jonathan Mays, clerk of our said court, at the court-house of said county, the 17th day of September, 1881, and in the 19th year of the State.

J. MAYS.

8 *Return.*

Executed the within summons by delivering an office copy thereof to Robert C. Rodes, depot agent for the Chesapeake and Ohio railroad, at Ronceverte, on the 23d day of Sept., 1881.

JAMES KNIGHT, *S. G. C.*

And at another day, to wit, at rules held in the clerk's office of the said circuit court on the first Monday in October, 1881, came the plaintiff and filed his declaration against the defendant, which declaration is in these words:

*Declaration.*

In the Circuit Court of said County.

STATE OF WEST VIRGINIA, *Greenbrier County,* } *ss:*

A. E. White, administrator of John D. White, *administrator of John D. White,* dec'd, plaintiff, complains of the Chesapeake and Ohio Railway Company, a corporation created under and by virtue of the laws of the States of Virginia and West Virginia, duly organized and existing in said States, defendant, of a plea of trespass on the case for this, to wit: That the defendant, before and at the time of committing the grievances hereinafter mentioned, was the owner and proprietor of the Chesapeake and Ohio railway, extending into and through the village of Ronceverte, in the county of Greenbrier and State of West Virginia; that heretofore, to wit, on the 19th day of April, 1881, in said village and county of Greenbrier, the defendant was occupying and using said railway for the purposes of propelling along and carrying over the same certain locomotive engines and carriages for the carriage and conveyance of freight and materials for hire and reward to the defendant in that behalf; that on the day and year last aforesaid the defendant was propelling along

and over said railway, in and through the village aforesaid, a certain locomotive engine and carriages for the purposes aforesaid, known as the westward-bound way-freight, under the conduct and control of one Charles Grooms, as conductor; that the said Charles Grooms was then an employé of the defendant, and managing the said locomotive and carriages for and by authority of the defendant at the time and place aforesaid; that the said village of Ronceverte is situate on both sides of said railway, with streets crossing the said railway at a number of different points, and a large number of inhabitants reside in said village, to wit, one thousand persons; that prior to and on the 19th day of April, 1881, the plaintiff's intestate was a resident of said village of Ronceverte, and was on said day on the side track of said railway in said village, and passing across said track from one part of said village to the other; that said intestate was then and at all times using due and proper care and caution against accidents and danger which might arise from the proper and lawful use of said railway by the defendant, and thereupon it became and was the duty of the defendant to use due and proper care and skill in and about the propelling and running of its locomotive engines and carriages aforesaid, and especially within the limits and the environs of said village; yet the defendant, not regarding its said duty in that behalf, did not use due and proper care nor skill in and about propelling and running its said locomotive engine and carriages at the time and place aforesaid, but omitted and neglected so to do, and so negligently and wrongfully conducted itself in and about propelling, running, and shifting said locomotive engine and carriages of the defendant on said railway and its sidings in said village, and in conducting and directing its carriages and locomotive engines aforesaid, and certain other locomotive engines and carriages then and there being shifted and moved by the defendant then on said railway; that by means of the premises, and by and through the mere neglect, carelessness, default, and improper conduct of defendant in that behalf, a certain carriage or carriages which, after having been put in rapid motion by and with the propelling force of said engine, to wit, the engine under the conduct and control of Charles Grooms as aforesaid, and while so in such rapid motion were detached by the defendant from said engine and allowed to run on the side track of said railway at a dangerous speed and without direction or proper control, on which the plaintiff's intestate then was, and over which he was passing in the village aforesaid, and that said carriages, detached as aforesaid, moving with great rapidity, to wit, at the rate of at least 25 miles an hour, *was* run and driven with great violence upon and against the plaintiff's intestate, and then and there, to wit, in the said village of Ronceverte, in the county aforesaid, on the day aforesaid, thereby caused great bodily injuries to be inflicted upon the said intestate, by reason whereof the said intestate afterwards, to wit, on the 20th day of April, 1881, died, and the plaintiff, as administrator as aforesaid, for the benefit of the widow and children, to wit, Eliza A. White, widow, and E. F. Johnson, wife of W. P. Johnson, A. E. White, C. E. White, A.

H. White, John B. White, Mollie I. White, and Burnie L. White, children of the said intestate, John D. White, according to the statute in such cases made and provided, claims $15,000 damages; and therefore plaintiff brings this action, &c.

MATTHEWS & SNYDER,
*For Pl'ff.*

Whereupon, the defendant not appearing, on motion of the plaintiff it was ordered that judgment be entered for the plaintiff against the defendant for the debt and interest in the declaration mentioned unless the said defendant should appear and plead at the then next rules.

At which day, to wit, at rules held in the clerk's office on the first Monday in November, 1881, the defendant still failing to appear, on motion of the plaintiff, it was ordered that the last order made against it in this cause be confirmed.

At another day, to wit, at a circuit court held for Greenbrier county, at the court house thereof, on the 10th day of Nov'r, 1881:

*Trespass on the Case.*

JOHN D. WHITE, Adm'r, *vs.* THE CHES. & OHIO RAILWAY CO.

This day came the parties, by their attorneys, and the de-
11 fendant, by its attorney, demurred generally to the plaintiff's declaration, and the plaintiff, by his attorneys, joined in said demurrer.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 18th day of April, 1882, this day came the plaintiff, by his attorney, and came also the defendant, by its attorney, and demurred to the plaintiff's declaration, and to each count thereof; in which demurrer the plaintiff joined. And the defendant also presented its petition herein, accompanied by a bond, according to the act of Congress, praying for the removal of this action to the district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers; to the filing of which petition and bond the plaintiff objected, and the court takes time to consider of said objections.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 28th day of April, 1882, this day came again the parties, by their attorneys, and thereupon the objections to the filing of the petition and bond to remove this action, which were tendered on a former day of this term, being argued and considered, the court is of opinion to, and doth accordingly, sustain the objections to the filing of the said petition and bond, for the reason that the same were not presented in time, because, in the opinion of the court, this term is not the first term at which this cause could be tried, and doth also refuse to remove this action as prayed for in the said petition; to which rulings and decisions, and each of them, the defendant excepted.

MEMO.—The defendant tendered a bill of exceptions herein, marked No. 1, which, being signed and sealed, is ordered to be filed and made part of the record of this action.

The said bill is in the words and figures following, to wit:

12 *Bill of Exceptions No. 1.*

Be it remembered that before this action was called for trial the defendant, by its attorneys, tendered a petition to remove this action to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers, which petition is in words and figures following, to wit:

*Petition.*

In the Circuit Court of Greenbrier County, State of West Virginia

A. E. WHITE, Adm'r of J. D. White, Deceased, Plaintiff,
*vs.*
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

Petition for removal to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers.

To the Hon. Homer A. Holt, judge of said court:

The petition of the Chesapeake and Ohio Railway Company, filed in the above-entitled suit now pending in said court, respectfully shows that the matter and amount in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner, the defendant in said suit, was, at the time of the commencement of said suit, and still is, a citizen of the State of *of* Virginia and not a citizen of the State of West Virginia, and that A. E. White, adm'r of J. D. White, the plaintiff in said suit, was, at the time of the commencement of said suit, and still is, a citizen of the State of West Virginia.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit court powers, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said district court if said court shall hold that this suit was wrongfully or improperly removed thereto. And your
13 petitioner prays this honorable court to proceed no farther herein, except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said district court of the United States in and for the district of West Virginia, sitting at Charleston. And your petitioner will ever pray, &c.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By WM. H. HOGEMAN, *Its Attorney.*

Tendered to the court this 18th day of April, 1882.

J. MAYS, *Cl'k.*

And also tendered a bond, with the certificate thereto, in the words and figures following:

*Bond.*

Know all men by these presents, that we, The Chesapeake and Ohio Railway Company, as principal, and William H. Hogeman, its surety, are held and firmly bound unto A. E. White, administrator of J. D. White, dec'd, and all other persons whom it may concern, in the penal sum of one thousand dollars, to the payment whereof, well and truly to be made, we bind ourselves, our successors, heirs, and representatives, jointly and severally, firmly by these presents, yet upon these conditions:

The Chesapeake and Ohio Railway Company having petitioned the circuit court of Greenbrier county, State of West Virginia, for the removal of a certain suit therein pending, wherein A. E. White, adm'r of J. D. White, deceased, is the plaintiff, and the said Chesapeake and Ohio Railway Company is defendant, to the district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit court powers: Now, if the said Chesapeake and Ohio Railway Company shall enter in the said district court of the United States for the district of West Virginia, sitting at Charleston, on the first day of its next session, a copy of the *the* record of said suit, and shall well and truly pay all costs that may be awarded by said district court if said court shall
14 hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

In witness whereof the said Chesapeake and Ohio Railway Company has caused its name to be signed and its corporate seal to be affixed hereto by William H. Hogeman, its assistant counsel; and the said William H. Hogeman, surety as aforesaid, has signed his name and affixed his seal hereto on the 1st day of April 1882.

[C. & O. Rw. Co., July 1, 1878.]

CHESAPEKE AND OHIO RAILWAY COMPANY,
By W. H. HOGEMAN, *As't Counsel.*
WM. H. HOGEMAN. [SEAL.]

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

I, Chas. Hedrick, a notary public in and for the county and State aforesaid, do certify that William H. Hogeman, who signed the foregoing writing, dated on the 1st day of April, 1882, in the name of the Chesapeake and Ohio Railway Company, this day acknowledged the same before me in my county aforesaid, for and on behalf of said company, and that William H. Hogeman, surety, whose name is also signed to said writing, this day acknowledged the said writing before me in my said county.

And I further certify that the said William H. Hogeman, being by me first duly sworn, said that he was worth the sum of one thousand dollars after the payment of all his own debts, and of all which he is liable to pay as surety for others, and after deducting all exemptions to which he is by law entitled.

Given under my hand this 1st day of April, 1882

C. HEDRICK,
*Notary Public of Kanawaha County, West Virginia.*

Tendered to the court this 18th day of April, 1882.

J. MAYS, *Clk.*

And moved to file the same, and also moved to grant the prayer of said petition. And the plaintiff, by his attorney, having objected to the filing of said petition and bond, and the said
15 objection having been argued and considered, the court was of opinion that the said petition and bond were not presented in time, because, in the opinion of the court, this term was not the first term of this court at which this action could be tried, and did therefore refuse to permit said petition and bond to be filed, and did refuse to grant the prayer of said petition; to which refusals and decisions, and each of them, the defendant then and there excepted, and prayed that its exception be signed, sealed, and saved to it, which is done accordingly.

IRA J. McGINNIS. [SEAL.]

*Bill of Exceptions No. 2.*

Be it remembered that after the defendant's special plea had been rejected by the court, and after it had put in the general issue of not guilty, and after issue had been joined on said last-mentioned plea, the defendant, by its attorney, again tendered the petition and bond set out in its bill of exceptions No. 1, which is here referred to and made a part of this bill, and moved the court to permit said petition and bond to be filed, and to remove this action to the district court of the United States for the district of West Virginia, sitting at Charleston, West Va., and exercising circuit court jurisdiction and powers. To the filing of which said petition and bond, and to the removal of said cause, the plaintiff, by its counsel, objected, which objection being argued by counsel the court sustained for the reason that said petition or bond were not tendered in time, the court being of opinion that this is not the first term at which said cause could have been tried, and refused to permit said petition and bond to be filed, and refued to remove the action as prayed for. To which ruling on the part of the court the defendant, by its counsel, excepted, and tendered this its bill of exceptions, which is signed, sealed, and made a part of the record.

IRA. J. McGINNIS. [SEAL.]

16 And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 22d day of April, 1882, this day came again the parties, by their attorneys, and

the defendant moved to quash the writ issued in this action for defects and errors apparent on the face thereof, which motion, being argued and considered, is overruled, and thereupon the matters of law arising on the defendant's demurrer to the plaintiff's declaration being argued and considered, the court was of opinion to and accordingly does overrule the said demurrer, and thereupon the defendant pleaded that it is not guilty in manner and form as the plaintiff in his declaration hath alleged, and of this the defendant puts itself upon the country, and the plaintiff doth the like. And the defendant tendered a special plea, accompanied by an affidavit herein in the words and figures following, to wit:

*Plea.*

And now comes the defendant, and for further plea to this action says that it is not a corporation created under and by virtue of the laws of the States of Virginia and West Virginia, as in the plaintiff's declaration is alleged; and this the defendant puts itself upon the country. Whereupon, &c.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
*By Counsel.*

WEST VIRGINIA, *Greenbrier County,* } *To wit:*

William H. Hogeman, being duly sworn, says that he is attorney of the Chesapeake and Ohio Railway Company, and is familiar with the matters on which the foregoing plea is founded, and that, as he verily believes, the foregoing plea is true.

WM. H. HOGEMAN.

Subscribed and sworn to before me this 20th day of April, 1882.
THOS. H. DENNIS,
*Notary Public.*

17 And moved to file the same, to which plaintiff objected, and said objection being argued and considered is sustained, and said plea and affidavit are not permitted to be filed; and thereupon the defendant, by its attorney, again tendered the petition and bond set out in bill of exceptions No. 1, and asked the court to remove this action, as prayed for in said petition; but, after objection by plaintiff, the court refused to permit said petition and bond to be filed, and refused to remove this action, as prayed for in said petition, to which defendant excepted; wherefore the cause is continued on the motion of the defendant, and at its cost.

And now, at this day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 29th day of June, 1882, this day came the parties, by their attorneys, and the plaintiff moved the court to proceed with the trial of this cause, which motion the defendant resisted upon the ground and for the reason that since the last term of this court a transcript of the record of the proceedings has been taken to the district court of the United States for the

district of West Virginia, and that this cause has been there regularly docketed; and it appearing to the satisfaction of this court that the facts thus stated are true, it doth, upon the ground and for the reason thus alleged by the defendant, and for that reason alone, decline and refuse to proceed further with this case.

MEMO.—To which opinion and ruling of the court the pl'f excepted.

STATE OF WEST VIRGINIA:

I, Jonathan Mays, clerk of the circuit court of Greenbrier county, do hereby certify that the foregoing is a true transcript of the record in the case of John D. White's adm'r *vs.* The Chesapeake and Ohio Railway Company, filed in my office.

Given under my hand this the 9th day of September, 1882.

JONATHAN MAYS, *Clk.*

(Fee for this record, $4.50.)

18 And on another day, to wit, at a supreme court of appeals held in Charleston, in Kanawha county, on the 20th day of January, 1883.

A. E. WHITE, Administrator of John D. White, deceased, Petitioner,

*vs.*

Hon. HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, Defendant.

Upon a petition for a writ of mandamus.

This day came the Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, and filed his answer to the rule heretofore awarded against him upon the petition of the plaintiff in the cause of A. E. White, administrator, *vs.* The Chesapeake and Ohio Railway Company, and the said railway company also appeared by W. H. Hogeman, Esq., its attorney, and filed the answer of said Chesapeake and Ohio Railway Company to the rule aforesaid, and for reasons appearing to the court it is ordered that the said rule be enlarged until next Wednesday, January 24, 1883.

And on another day, to wit, on the 24th day of January, 1883, the following order was entered:

*Order.*

A. E. WHITE, Administrator of John D. White, deceased, Petitioner,

*vs.*

Hon. HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, Defendant.

Upon a petition for a writ of mandamus.

This day came again the petitioner, by Alex. F. Matthews, Esq., his attorney, and the defendant, the Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, and the Chesapeake

and Ohio Railway Company, by W. H. Hogeman, Esq., its attorney, and the said Railway Company, by its attorney, here filed as an exhibit accompanying its answer to the rule issued in this cause a transcript of the record of proceedings had in the district court of the United States for the district of West Virginia, sitting at Charleston, in the case of the Chesapeake and Ohio Railway Company against A. E. White, administrator of J. D. White, deceased,
19 marked "A," and neither party desiring to argue the case, this case was fully heard upon the petition and rule aforesaid, the answer of the Hon. Homer A. Holt, judge as aforesaid, the answer of the Chesapeake and Ohio Railway Company, and the several exhibits accompanying the petition and answers aforesaid, but, the court not being advised of the judgment to be given, time is taken to consider thereof.

The answer of the Hon. Homer A. Holt is as follows:

*Answer of Hon. Homer A. Holt.*

Supreme Court of Appeals of West Virginia.

A. E. WHITE, Administrator of JOHN D. WHITE,
*against*
Honorable HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, West Virginia.

On rule to show cause why mandamus should not issue.

To the honorable the supreme court of appeals of West Virginia:

This respondent, Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, for return and answer to the rule awarded by your honorable court on the 14th day of October, 1882, on the petition of A. E. White, administrator of John D. White, deceased, requiring this respondent to show cause, if any he can, why a peremptory writ of mandamus should not issue requiring him to proceed with the trial of a certain action of trespass on the case in which A. E. White, administrator of John D. White, deceased, is plaintiff and the Chesapeake and Ohio Railway Company is defendant, respectfully shows:

First. Respondent has no interest whatever in the action aforesaid, or in the rule aforesaid, or in the result of the said rule, and he is therefore entirely indifferent and unconcerned about the disposition of said rule, except only to have an authoritative and correct exposition of the law respecting such matter. Whatever respondent has done or decided in the action aforesaid has been done
20 and decided only in accordance with respondent's opinion and judgment of his duty in the premises, after hearing the facts and the views of the parties interested, by their attorneys, as to respondent's duty under the law. In this opinion and judgment respondent may have erred, and he is entirely willing that this opinion and judgment should be reviewed, and if found to be erroneous he is not only willing but anxious that it shall be corrected.

Second. Respondent does not pretend to say that his opinion and decision in the action aforesaid, as set out in the petition on which the rule aforesaid was awarded, cannot be reviewed, inquired of, or corrected in this proceeding. On that matter respondent expreses no opinion of his own, but he is informed by the defendant in the action aforesaid, through its attorney, that the said defendant claims this cannot be done. In order that the power of your honorable court to review, inquire of, or correct the opinion and decision of respondent in the premises by means of this proceeding may, if desired, be inquired into, he calls attention to the aforesaid claim of the defendant in the action aforesaid and leaves it for your honorable court to take such action thereon as may be found proper.

Third. Respondent, further answering, says that he did not preside over the circuit court of Greenbrier county at the term of said court when the petition and bond for the removal of the aforesaid action were presented and the said bond approved, but such court was at that term presided over by a judge of another circuit. He did, however, preside over said court at the succeeding term, at which the plaintiff moved respondent to proceed with the trial of said action, which motion respondent overruled. This motion respondent overruled, and he declined and refused to proceed further with said action, because it was made to appear to respondent that, notwithstand the proceedings had in said action in the circuit court of Greenbrier county at the preceding term, a transcript of the record of said action had prior to such motion been filed, and the said action docketed in the district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit
21 court powers, and because said action was then pending in said district court. Under the circumstances respondent was of opinion, and accordingly decided, that the jurisdiction of the circuit court of Greenbrier county had ceased, and that he could proceed no further with said action. Respondent files herewith as part of this answer a cirtified copy of the order of the said district court, filing therein the record of said action and docketing said action to be further proceeded in *in* said court according to the act of Congress in relation to cases removed from the State courts to the courts of the United States.

In view of the premises, respondent ask that the mandamus prayed for be denied, and the rule which has been awarded against him be discharged.

H. A. HOLT.

(Endorsement:) A. E. White, adm'r, *vs.* Hon. Homer A. Holt. On a rule. Answer to rule filed Jan'y 20th, 1883. Attest: O. S. Long, cl'k.

*Trespass on the Case.*

At a District Court of the United States for the District of West Virginia, held at Charleston, May 1st, 1882.

A. E. WHITE, Adm'r of J. D. White, Deceased,
*vs.*
CHESAPEAKE AND OHIO RAILWAY CO.

This day came the defendant, by Wm. H. Hogeman, its attorney, and presented a true and complete transcript of the record of the above-entitled action lately pending in the circuit court of Greenbrier county, West Virginia, including therein the proceedings taken to remove said action from said circuit court to this court; and on motion of said defendant it is ordered that the transcript of the record aforesaid be filed and this action docketed in the court, to be therein proceeded with pursuant to the act of Congress in such cases made and provided.

22 I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, certify that the foregoing is a true copy of an order entered on the records of my said court at Charleston, May 1, 1882.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my said court at Charleston, Dec. 28, 1882.

Teste: JASPER Y. MOORE,
*Clerk D. C. U. S. D. W. Va.*

District court United States, district West Virginia, Charleston, West Va.
(Fee for copy 55c.)

The answer of the Chesapeake and Ohio Railway Company, with its accompanying Exhibit "A," is as follows:

*Answer of Chesapeake and Ohio Railway Company.*

E. A. WHITE, Adm'r of J. D. White, Deceased,
*vs.*
Hon. HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, West Virginia.

On a rule for a peremptory writ of mandamus.

To the honorable the supreme court of appeals of West Virginia:

The Chesapeake and Ohio Railway Company, by way of answer to the rule awarded by your honorable court on the 14th day of October, 1882, on the petition of A. E. White, administrator of John D. White, deceased, requiring Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, to show cause, if any he can, why a peremptory writ of mandamus should not issue requiring him to proceed with the trial of a certain action of trespass on the case in which A. E. White, administrator of John D. White, deceased,

is plaintiff, and the Chesapeake and Ohio Railway Company
23 is defendant, and to which rule this respondent has been made a party, and of which a copy has been served on respondent, says that a peremptory writ of mandamus as described in said rule should not be allowed, awarded, or issued, but, on the contrary, the said rule should be dismissed for the following reasons:

First. This proceeding is neither an appropriate or available remedy under the law to accomplish the object of the petitioner in this proceeding. If the action of the honorable judge of the circuit court of Greenbrier county in the matters referred to in the rule aforesaid, and in the petition on which such rule was awarded, was improper or erroneous it cannot be reviewed or corrected by means of this proceeding, nor can the judge of the said circuit court, by virtue of any order, judgment, or writ which can be legally entered or awarded herein, be compelled to proceed with the trial of the action referred to in the rule aforesaid.

Second. The action of the honorable Homer A. Holt, judge of the circuit court of Greenbrier county, in the action referred to in the rule aforesaid was proper and correct, and was justified by the facts and circumstances of the case. The said action had been legally removed to the district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers, in conformity to the act of Congress in relation to such matters, and the jurisdiction of the said district court had legally attached to said action, and that of the said circuit court of Greenbrier county had ceased and determined.

Third. For reasons set out in a bill of complaint filed by this respondent against A. E. White, administrator of J. D. White, deceased, in the district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers, an order of injunction has been awarded and perfected in said district court and served on the said A. E. White, administrator of J. D. White, deceased, and on his attorney, Alexander F. Mathews, Esq.,
restraining, inhibiting, and enjoining the said White, adm'r,
24 &c., and his agents and attorney, from further proceeding with the aforesaid application to your honorable court for a peremptory writ of mandamus. A complete transcript of the record of the said injunction, including therein the bill of complaint and exhibits, the order of injunction, and the process and return of service thereon endorsed, is herewith filed and made part of this answer, marked A.

The said injunction is undissolved and in full force, and respect and obedience thereto should be enforced and is demanded. While this injunction remains in force it would be eminently improper to proceed further with this proceeding.

In view of the premises respondent asks that the mandamus prayed for be denied and the rule aforesaid discharged.

CHESAPEAKE AND OHIO RAILWAY CO.,
By WM. H. HOGEMAN, *Att'y.*

WEST VIRGINIA, *Kanawha County,* } *To wit:*

W. H. Hogeman, being duly sworn, says: He is attorney for the Chesapeake and Ohio Railroad Co., and as such is familiar with the matters set out in the foregoing answer, and that, as he verily believes, the matters of fact alleged in said answer are true.

WM. H. HOGEMAN.

Subscribed and sworn to before me, this 20th of Jan., 1883.

W. S. LAIDLEY,
*Notary Public, Kanawha Co., W. Va.*

(Endorsed:) A. E. White, adm'r of J. D. White, *vs.* Hon. Homer A. Holt. Answer of the C. & O. Railway Co. Filed Jan'y 20th, 1883. Attest: O. S. Long, cl'k.

25 *Record from United States Court.*

Pleas held before the Hon. John J. Jackson, judge of the district court of the United States for the district of West Virginia, at his office in Parkersburg, in said district, on the 10th day of January, 1883:

On which day the following order was made by said judge and received and entered in the clerk's office of said court at Charleston, on the 12th day of January, 1883:

CHESAPEAKE AND OHIO RAILWAY CO. *against* A. E. WHITE, Adm'r of J. D. White, Deceased. } In Chancery.

On examination of the complainant's bill and the exhibits therein referred to, and it appearing that due notice of the application for an injunction in the cause aforesaid has been served on A. E. White, adm'r of J. D. White, deceased, it is ordered that A. E. White, adm'r of J. D. White, deceased, his attorneys and agents, be and they are hereby inhibited, restrained, and enjoined until otherwise ordered in the cause aforesaid from proceeding any further with the application for a peremptory writ of mandamus in the supreme court of appeals of West Virginia, or elsewhere, requiring the judge of the circuit court of Greenbrier county, West Virginia, to proceed with the trial of a certain action described in the bill aforesaid, brought by A. E. White, administrator of John D. White, deceased, as plaintiff, against the Chesapeake and Ohio Railway Company as defendant, or in any other way to secure a trial of the said action in the circuit court of Greenbrier county, West Virginia; but this injunction is not to take effect until the complainant, or some one for it, enters into bond, with good security, in the penalty of $1,000, before the clerk of the district court of the United States for the dis-
26 trict of West Virginia, with condition to pay all costs and damages that may be incurred or sustained by the defendant in case this injunction should be dissolved. The clerk is directed to enter this order.

Given under my hand this 10th day of January, 1883, at my office in Parkersburg, in the district of West Virginia.

J. J. JACKSON,
*Judge D. C. U. S. D., W. Va.*

To the clerk of the district court of the United States for the district of West Virginia at Charleston.

The bill, exhibits, and notice referred to in the foregoing order are in the words and figures following, to wit:

*Bill of Complaint.*

The bill of complaint filed by the Chesapeake and Ohio Railway Company against A. E. White, adm'r of the estate of John D. White, deceased, in the district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers.

To the Hon. John J. Jackson, judge of said court:

Humbly complaining, your orator, the Chesapeake and Ohio Railway Company, showeth unto your honor as follows, to wit:

On the 17th day of September, 1881, the defendant, A. E. White, administrator of the estate of John D. White, deceased, instituted in the circuit court of Greenbrier county, West Virginia, an action of trespass on the case against your orator to recover the sum of $15,000 claimed by said White, as such administrator of your orator in said action. To this action your orator appeared in said circuit court of Greenbrier county, and, among other things, presented and tendered to said court in said action, in due time and form, a proper petition for the removal of said action from the said circuit court of Greenbrier county to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district,
27 and exercising circuit court powers, and at the same time presented and tendered with said petition a bond, with sufficient surety, in due form, and as required by the act of Congress in relation to the removal of causes from the State courts to the courts of the United States. Notwithstanding the said circuit court of Greenbrier county refused to permit the said petition and bond to be filed, and refused to remove said action from the said circuit court to the said district court for the sole reason that, in the opinion of the said circuit court, the said petition and bond were not presented in time. To the action of said circuit court in refusing to file said petition and remove said action your orator excepted, and in such exception he embodied the said petition and bond, so that the same might become a part of the record of said action, and such exception was duly signed and sealed and reserved to your orator and made part of the record of said action.

Further complaining, your orator avers that it was advised and believed that the reason for which said circuit court refused to file said petition and bond and remove said action had no foundation in law or in fact; that, on the contrary, the said petition and bond

were presented and tendered to said circuit court in due time, and that the refusal of said circuit court to file said petition and bond and remove said action was wholly unwarranted and illegal; and that, notwithstanding the said action and decision of said circuit court, the said action was by virtue of what it had done in the premises removed from the said circuit court to the said district court. Accordingly your orator obtained from the clerk of the said circuit court of Greenbrier county a full and complete transcript of the record of said action, including therein all proceedings had to remove the same as aforesaid; and on the 1st day of May, 1882, that being the first day of the first term of the district court of the United States for the district of West Virginia, sitting at Charleston, after the action of the said circuit court, your orator presented such transcript to the said district court, and moved to file
28 said transcript and docket said action therein; and the said motion having been heard, the said district court, by order then and there entered, directed said transcript to be filed and said action to be docketed in said district court, to be therein proceeded with pursuant to act of Congress in such cases made and provided.

Your orator avers that, by virtue of the proceedings aforesaid and of the act of Congress in relation thereto, the jurisdiction of the circuit court in and over the action aforesaid ceased and determined, and that no further proceedings could thereafter be properly had in said action in or by said circuit court, and that in like manner the sole and exclusive jurisdiction in, of, and over said action and of all further proceedings therein became vested in and attached to the said district court.

Notwithstanding, the defendant herein, subsequently, to wit, on the — day of June, 1882, at a term thereof then in session, applied to the circuit court of Greenbrier county, and moved said court for a trial of said action; but it having been made to appear that a transcript of the record of said action had already been filed and the said action docketed in said district court, and that said district court had ordered said action to be proceeded with in said district court, and the said circuit court being of opinion that said action was then pending in said district court, the said circuit court overruled the motion of the defendant herein and refused to try said action.

Afterwards, to wit, on the 6th day of November, 1882, at a term then in session of the said district court at Charleston, final judgment was rendered in the said action in favor of your orator and against the defendant herein.

This judgment is in full force and binding on the parties thereto, and is a judgment of a court which had jurisdiction, at the time of its rendition, of both the parties thereto and the subject-matter thereof, and your orator is entitled to have the benefit thereof and of all the advantages accruing therefrom.

There is herewith filed to be read as part of this bill of
29 complaint a full and complete transcript of the action and judgment aforesaid as the same now exists in the said district court. The said transcript is marked Exhibit No. 1.

Further complaining, your orator avers that since the rendition and entry of the aforesaid judgment of the said district court in said action your orator has been formally notified by a copy of the order relating thereto that on the application of the defendant herein a rule has been awarded by the honorable the supreme court of appeals of West Virginia commanding the judge of the circuit court of Greenbrier county to show cause, if any he can, on the tenth day of the term of said court, appointed by law to begin in Charleston on January 10, 1883, why a peremptory writ of mandamus should not issue from said supreme court of appeals to him, requiring him, as judge as aforesaid, to proceed with the trial of the said action.

By the order directing the said rule a copy of the said order is directed to be served on your orator. This has been done, and the rule aforesaid has also been served, in the manner required by said order, on the judge of the said circuit court of Greenbrier county, and it is the purpose and intention of the defendant herein, as your orator is informed and believes, unless prevented, to docket said rule in said supreme court of appeals of West Virginia, and to apply for and if possible to obtain from said court the peremptory writ of mandamus commanding said judge of the circuit court of Greenbrier county to proceed with the trial of said action. A true copy of the order awarding the rule aforesaid is herewith filed, marked Exhibit No. 2.

Your orator avers that the proceedings thus far had in the supreme court of appeals, and those intended as aforesaid by the defendant herein, are without authority of law, are in contempt and disregard of the authority and judgment of the said district court, are intended and calculated to evade the action of said district court and deprive your orator of the benefit of the judgment of said court, and are calculated to defeat the object of said judgment, which ended the controversy in said action, by reopening and relitigating the said controversy in defiance of said judgment. Inasmuch as the said district court by injunction has full and ample power and authority to prevent this and to enforce and protect its said judgment in favor of your orator, such power and authority should be exerted and exercised, and your orator desires that it may be. In tender consideration whereof, and forasmuch as your orator is otherwise remediless, it prays that A. E. White, as administrator of John D. White, deceased, be made a party defendant to this bill; that he be required to answer the same, and each allegation thereof, under oath, fully and specifically as if thereto particularly interrogated; that a preliminary order of injunction be awarded inhibiting, restraining, and enjoining the said defendant, his attorneys and agents, from proceeding any further with the application for a mandamus in the supreme court of appeals of West Virginia, or elsewhere, or in any other way to secure a trial of the action aforesaid in the circuit court of Greenbrier county until the matters arising herein can be heard and determined, and that at such hearing the said injunction be made perpetual. And your orator prays for such

other, further, and general relief as to equity and good conscience seems meet and the circumstances of its case may require.

CHESAPEAKE AND OHIO RAILWAY CO.,
*By Counsel.*

WM. H. HOGEMAN,
*Of Counsel for Complainant.*

UNITED STATES OF AMERICA, }
*District of West Virginia,* } *ss:*

Wm. H. Hogeman, being duly sworn, says: That he is attorney for the complainant in the foregoing bill; that as such attorney he has had charge of, and is familiar with, the matters in said bill mentioned; that the matters therein alleged on his own knowledge are true, and those therein alleged on information derived from others he believes to be true.

WM. H. HOGEMAN.

31 Subscribed and sworn to before me, this 4th day of Jan'y, 1883.

JASPER Y. MOORE,
*Clerk Dist. Ct. U. S., D. W. Va.*

EXHIBIT No. 1.

*Transcript of Record.*

Pleas before the Hon. John J. Jackson, judge of the district court of the United States for the district of West Virginia, held at Charleston, November 6th, 1882, and in the 107th year of the Independence of the United States:

Be it remembered that heretofore, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, on the 1st day of May, 1882:

A. E. WHITE, Adm'r of J. D. White, Dec'd,
*vs.*
CHESAPEAKE AND OHIO RAILWAY COMPANY.

Trespass on the case.

This day came the defendant, by Wm. H. Hogeman, its attorney, and presented a true and complete transcript of the record of the above-entitled action lately pending in the circuit court of Greenbrier county, West Virginia, including therein the proceedings taken to remove said action from said circuit court to this court, and on motion of said defendant it is ordered that the transcript of the record aforesaid be filed, and this action docketed in this court, to be therein proceeded with pursuant to the act of Congress in such cases made and provided.

The transcript of the record referred to in the foregoing order is in the words and figures following, to wit:

32 *Record from Circuit Court of Greenbrier County.*

WEST VIRGINIA:

Pleas before the circuit court for the county of Greenbrier, on Saturday, April the 22d, 1882:

Be it remembered that heretofore, to wit, on the 17th day of September, 1881, came A. E. White, administrator of John D. White, deceased, and sued out of the office of the said circuit court a writ of summons against the Chesapeake and Ohio Railway Company, which writ, with the endorsement and return thereon made, is in the words and figures following:

*Summons.*

State of West Virginia to the sheriff of Greenbrier county, Greeting:

We command you that you summon the Chesapeake and Ohio Railway Company, if it be found within your bailiwick, to appear before the judge of the circuit court for the said county, at the clerk's office of our said court, at rules to be held for said court on the first Monday in October next, to answer A E. White, administrator of John D. White, dec'd, of a plea of trespass on the case: damages, $15,000. And have then [and] there this writ.

Witness, Jonathan Mays, clerk of our said court, at the courthouse of said county, the 17th day of September, 1881, and in the 19th year of the State.

J. MAYS.

*Return.*

Executed the within summons by delivering an office copy thereof to Robert C. Rodes, depot agent for Chesapeake and Ohio railroad, at Ronceverte, on the 23d day of September, 1881.

JAMES KNIGHT, *S. G. C.*

33 And at another day, to wit, at rules held in the clerk's office of the said circuit court, on the first Monday in October, 1881, came the plaintiff and filed his declaration against the defendant, which declaration is in these words:

*Declaration.*

In the Circuit Court of said County.

STATE OF WEST VIRGINIA, *Greenbrier County,* } *ss:*

A. E. White, adm'r of John D. White, dec'd, plaintiff, complains of the Chesapeake and Ohio Railway Company, a corporation created under and by virtue of the laws of the States of Virginia and West Virginia, duly organized and existing in said States, defendant, of a plea of trespass on the case, for this, to wit: That the defendant, before and at the time of committing the grievances hereinafter mentioned, was the owner and proprietor of the Chesapeake and Ohio railway, extending into and through the village of

Ronceverte, in the county of Greenbrier and State of West Virginia; that heretofore, to wit, on the 19th day of April, 1881, in said village and county of Greenbrier, the defendant was occupying and using said railway for the purposes of propelling along and carrying over the same certain locomotives, engines, and carriages, for the carriage and conveyance of freight and materials for hire and reward to the defendant in that behalf; that on the day and year last aforesaid the defendant was propelling along and over said railway, in and through the village aforesaid, a certain locomotive engine and carriages for the purposes aforesaid, known as the westward-bound way-freight, under the conduct and control of one Charles Grooms as conductor; that the said Charles Grooms was then an employé of the defendant and managing the said locomotive and carriages for and by authority of the defendant, at the time and place aforesaid; that the said village of Ronceverte is situate on both sides of said railway, with streets crossing the said railway at a number of different points, and a large number of inhabitants reside in said village, to wit, one thousand persons; that prior to and on the said 19th day of April, 1881, the plain-
34 tiff's intestate was a resident of said village of Ronceverte, and was on said day on the side track of said railway in said village, and passing across said track from one part of said village to the other; that said intestate was then and at all times using due and proper care and caution against accidents and danger which might arise from the proper and lawful use of said railway by the defendant, and thereupon it became and was the duty of the defendant to use due and proper care and skill in and about the propelling and running of its locomotive engines and carriages aforesaid, and especially within the limits and the environs of said village; yet the def't, not regarding its said duty in that behalf, did not use due and proper care nor skill in and about propelling and running its said locomotive engine and carriages at the time and place aforesaid, but omitted and neglected so to do, and so negligently and wrongfully conducted itself in and about propelling, running, and shifting said locomotive engine and carriages of the defendant on said railway and its sidings in said village, and in conducting and directing its carriages and locomotive engine aforesaid, and certain other locomotive engines and carriages then and there being shifted and moved by the def't then on said railway; that by means of the premises, and by and through the mere neglect, carelessness, default, and improper conduct of defendant in that behalf, a certain carriage or carriages, which, after having been put in rapid motion by and with the propelling force of said engine, to wit, the engine under the conduct and control of Charles Grooms as aforesaid, and while so in such rapid motion were detached by the defendant from said engine and allowed to run on the side track of said railway at a dangerous speed and without direction or proper control on which the plff's intestate then was and over which he was passing, in the village aforesaid, and that said carriages, detached as aforesaid, moving with great rapidity, to wit, at the rate of at least 25 miles an hour, *was* run and driven with great violence upon and against

the plaintiff's intestate, and then and there, to wit, in the said
35 village of Ronceverte, in the county aforesaid, on the day aforesaid, thereby caused great bodily injuries to be inflicted upon the said intestate, by reason whereof the said intestate, afterwards, to wit, on the 20th day of April, 1881, died, and the plaintiff, as adm'r as aforesaid, for the benefit of the widow and children, to wit, Eliza A. White, widow, and E. I. Johnson, wife of W. P. Johnson, A. E. White, C. E. White, A. H. White, John B. White, Mollie J. White, and Burnie L. White, children of the said intestate, John D. White, according to the form of the statute in such cases made and provided, claims $15,000 damages; and therefore pl'ff brings this action, &c.

MATHEWS & SNYDER,
*For Pl'ff.*

Whereupon, the defendant not appearing, on motion of the plaintiff at rules, it was ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff has sustained by occasion of the said defendant's trespass in the declaration mentioned unless the said defendant shall appear and plead to issue at the next rules.

At which day, to wit, at rules held in the clerk's office of said circuit court on the first Monday in November, 1881, the defendant still failing to appear, on the motion of the plaintiff, by his attorney, it is ordered that the last order made against him in this cause be confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

WEST VIRGINIA:

At a circuit court held for Greenbrier county, at the court-house thereof, on the 10th day of November, 1881.

JOHN D. WHITE, Adm'r, *vs.* CHES. & OHIO RAILWAY.

In trespass.

This day came the parties, by their attorneys, and the defendant, by its attorney, demurred generally to the plaintiff's declaration, and the plaintiff, by his attorneys, joined in said demurrer.

36 And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 18th day of April, 1882.

A. E. WHITE, Adm'r of J. D. White, Dec'd,
*vs.*
CHESAPEAKE & OHIO RAILWAY COMPANY.

Trespass on the case.

This day came the plaintiff, by his attorney, and thereupon came also the defendant, by its attorney, and demurred to the plaintiff's declaration, and to each count thereof, in which demurrer the plain-

tiff joined; and the defendant also presented its petition herein, accompanied by a bond, according to the act of Congress, praying for the removal of this action to the district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers; to the filing of which petition and bond the plaintiff objected, and the court takes time to consider of said objections.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 20th day of April, 1882.

A. E. WHITE, Adm'r of J. D. White,
*vs.*
CHESAPEAKE & OHIO RAILWAY CO.

Trespass on the case.

This day came again the parties, by their attorneys, and thereupon the objections to the filing of the petition and bond to remove this action, which were tendered on a former day of this term, being argued and considered, the court is of opinion to and doth accordingly sustain the objections to the filing of the said petition and bond, for the reason that the same was not presented in time, because, in the opinion of the court, this term is not the first term at which this cause could be tried, and doth also refuse to remove this action as prayed for in the said petition; to which rulings and decisions, and each of them, the defendant excepted.

MEMO.—The defendant tendered a bill of exceptions herein, marked No. 1, which, being signed and sealed, is ordered to be filed and made part of the record of this action.

37 The said bill is in the words and figures following, to wit: "Be it remembered," &c.:

*Bill of Exceptions No.* 1.

A. E. WHITE, Adm'r of J. D. White, Dec'd,
*vs.*
CHESAPEAKE & OHIO RAILWAY COMPANY.

Trespass on the case.

Be it remembered that before this action was called for trial the defendant, by its attorneys, tendered a petition to remove this action to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers, which petition is in the words and figures following, to wit:

Petition endorsed: Tendered to the court this 18th day of April, 1882. J. Mays, clerk.

*Petition.*

In the Circuit Court of Greenbrier County, State of West Virginia.

A. E. WHITE, Adm'r of J. D. White, Deceased, Pl'ff,
*vs.*
CHESAPEAKE AND OHIO RAILWAY COMPANY, Def't.

Petition for removal to the district court of the United States for the district of West Va., sitting at Charleston, in said district, and exercising circuit court powers.

To the Hon. Homer A. Holt, judge of said court:

The petition of the Chesapeake and Ohio Railway Company filed in the above-entitled suit, now pending in said court, respectfully shows that the matter and amount in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner, the defendant in said suit, was at the time of the commencement of said suit, and still is, a citizen of the State of Virginia and not a citizen of the State of West Virginia, and that

38 A. E. White, adm'r of J. D. White, the plaintiff in said suit, was at the time of the commencement of said suit, and still is, a citizen of the State of West Virginia.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said district court of the United States for the district of West Virginia, sitting at Charleston and exercising circuit court powers, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said district court if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no farther herein except to make the order of removal required by law, and to accept the said surety and bond, and cause the record herein to be removed into said district court of the United States in and for the district of West Virginia, sitting at Charleston.

And your petitioner will ever pray, &c.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By WILLIAM H. HOGEMAN,
*Its Attorney.*

And also tendered a bond, with the certificate thereto, in the words and figures following, to wit:

*Bond.*

Know all men by these presents that we, The Chesapeake and Ohio Railway Company, as principal, and William H. Hogeman, its surety, are held and firmly bound to A. E. White, adm'r of J. D. White, dec'd, and all other persons whom it may concern, in the penal sum of one thousand dollars, to the payment whereof, well and truly to be made, we bind ourselves, our successors, heirs, and

representatives, jointly and severally, firmly by these presents, yet upon these conditions, that said Chesapeake and Ohio Railway Company having petitioned the circuit court of Greenbrier county, State of West Virginia, for the removal of a certain suit therein pending, wherein A. E. White, adm'r of J. D. White, deceased, is plaintiff and the said Chesapeake and Ohio Railway Company is defendant,
to the district court of the United States for the district of
39 West Virginia, sitting at Charleston and exercising circuit court powers: Now, if the said Chesapeake and Ohio Railway Company shall enter in the said district court of the United States for the district of West Virginia, sitting in Charleston, on the first day of its next session, a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said district court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

In witness whereof the said Chesapeake and Ohio Railway Company has caused its name to be signed and its corporate seal to be affixed hereto by William H. Hogeman, surety as aforesaid, — has signed his name and affixed his seal hereto on this 1st day of April, 1882.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

[SEAL.] By WM. H. HOGEMAN, *Ass't Counsel.*

WM. H. HOGEMAN. [SEAL.]

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

I, Charles Hedrick, a notary public in and for the county and State aforesaid, do certify that William H. Hogeman, who signed the foregoing writing, dated on the first day of April, 1882, in the name of the Chesapeake and Ohio Railway Company, this day acknowledged the same before me, in my county aforesaid, for and on behalf of said company, and that William H. Hogeman, surety, whose name is also signed to said writing, this day acknowledged the said writing before me, in my said county.

And I further certify that the said William H. Hogeman, being by me first duly sworn, said that he was worth the sum of one thousand dollars after the payment of all his own debts and of all which he is liable to pay as surety for others, and after deducting all exemptions to which he is by law entitled.

Given under my hand this 1st day of April, 1882.

C. HEDRICK,

*Notary Public for Kanawha County, W. Va.*

40 Bond endorsed: Tendered to the court this 18th day of April, 1882. J. Mays, cl'k.

And moved to file the same, and also moved to grant the prayer of said petition. And the plaintiff, by his attorney, having objected to the filing of said petition and bond, and the said objection having

been argued and considered, the court was of opinion that the said petition and bond were not presented in time, because, in the opinion of the court, this term was not the first term of this court at which this action could be tried, and did therefore refuse to permit said petition and bond to be filed, and did refuse to grant the prayer of said petition; to which refusals and decisions, and each of them, the defendant then and there excepted, and prayed that its exception be signed, sealed, and saved to it, which is done accordingly.

IRA J. McGINNIS. [SEAL.]

*Bill of Exceptions No. 2.*

A. E. WHITE, Adm'r of J. D. White,

*vs.*

CHESAPEAKE & OHIO RAILWAY CO.

Bill of exceptions No. 2.

Be it remembered that after the defendant's special plea had been rejected by the court, and after it had put in the general issue of not guilty, and after issue had been joined on said last-mentioned plea, the defendant, by its attorney, again tendered the petition and bond set out in its bill of exceptions No. 1, which is here referred to and made a part of this bill, and moved the court to permit said petition and bond to be filed and to remove this action to the district court of the United States for the district of West Virginia, sitting at Charleston, West Va., and exercising circuit court jurisdiction and *and* powers; to the filing of which said petition and bond, and to the removal of said cause, the plaintiff, by his counsel, objected, which objection, being argued by counsel, the court sustained, for the reason that said petition and bond were not tendered in time, the court being of opinion that this is not the first term at
41 which said cause could have been tried, and refused to permit said petition and bond to be filed, and refused to remove the action as prayed for; to which ruling on the part of the court the defendant, by its counsel, excepted, and tendered this its bill of exceptions, which is signed, sealed, and made a part of the record.

IRA J. McGINNIS. [SEAL.]

And now, at this day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 22d day of April, 1882:

A. E. WHITE, Adm'r of J. D. White,

*vs.*

CHESAPEAKE & OHIO RAILWAY COMPANY.

Trespass on the Case.

This day came again the parties, by their attorneys, and the defendant moved to quash the writ issued in this action for defects and errors apparent on the face thereof, which motion, being argued and considered, is overruled; and thereupon the matters of law arising on the defendant's demurrer to the plaintiff's declaration being

argued and considered, the court was of opinion to and accordingly does overrule the said demurrer; and thereupon the defendant pleaded that it is not guilty in manner and form as the plaintiff in his declaration hath alleged; and of this the defendant puts itself upon the country, and the plaintiff doth the like, and the defendant tendered a special plea, accompanied by an affidavit herein, in the words and figures following, to wit:

*Plea.*

A. E. WHITE, Adm'r of John D. White, Dec'd
*vs.*
CHESAPEAKE & OHIO RAILWAY CO.

Trespass on the Case.

And now comes the defendant and, for further plea to this action, says that it is not a corporation created under and by virtue of the laws of the States of Virginia and West Virginia, as in the plaintiff's declaration is alleged; and this the defendant puts itself upon the country. Whereupon, &c.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
*By Counsel.*

42 WEST VIRGINIA, *Greenbrier County,* } *To wit:*

William H. Hogeman, being duly sworn, says: That he is attorney of the Chesapeake and Ohio Railway Company, and is familiar with the matters on which the foregoing plea is founded, and that, as he verily believes, the foregoing plea is true.

WM. H. HOGEMAN.

Subscribed and sworn to before me, this 20th day of April, 1882.
THOS. H. DENNIS,
*Notary Public.*

And moved the court to file the same, to which plaintiff objected, and said objection, being argued and considered, is sustained, and said plea and affidavit are not permitted to be filed; and thereupon the defendant, by its attorneys, again tendered the petition and bond set out in bill of exceptions No. 1, and asked the court to remove this action, as prayed for in said petition; but, after objection by plaintiff, the court refused to permit said petition and bond to be filed, and refused to remove this action, as prayed for in said petition, to which defendant excepted; and thereupon the cause is continued on the motion of the defendant and at its cost.

STATE OF WEST VIRGINIA, *Greenbrier County,* } *To wit:*

I, Jonathan Mays, clerk of the circuit court of Greenbrier county, do hereby certify that the foregoing is a true and complete transcript of the record of the case of A. E. White, adm'r of J. D. White,

*vs.* Chesapeake and Ohio Railway Company, now pending in the circuit court of Greenbrier county, West Virginia.

Given under my hand this the 28th day of April, 1882.

JONATHAN MAYS, *Clerk.*

And now at this day, to wit, at a district court of the United
43 States for the district of West Virginia, held at Charleston, on the day and date first herein mentioned, to wit, on the 6th day of November, 1882, this day came the defendant, by its attorney, and the plaintiff, though solemnly called, came not.

Thereupon it is considered that the said plaintiff be non-suit, and that the defendant go hence without day, and that it recover against the plaintiff $5.00 damages for his false clamor besides its costs in and about its defense herein expended.

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, certify that the foregoing is a complete transcript of the record of an action at law lately pending in my said court, at Charleston, in which A. E. White, adm'r of J. D. White, was plaintiff and the Chesapeake and Ohio Railway Company was defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my said court, at Charleston, this 28th day of December, 1882.

[L. S.]

JASPER Y. MOORE,
*Clerk D. C. U. S., D. W. Va.*

EXHIBIT No. 2.

WEST VIRGINIA, *To wit:*

At a supreme court of appeals held in Wheeling, in Ohio county, on the 14th day of October, 1882, this day came A. E. White, adminiinistrator of John D. White, deceased, by A. F. Mathews, Esq., his attorney, and presented a petition for a writ of mandamus to be directed to the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, requiring him to proceed with the trial of a certain action of trespass on the case, in which the said petitioner is plaintiff and the Chesapeake and Ohio Railway Company is defendant, "just as other causes on the trial docket of said circuit court are disposed of, or else to show cause why he has not done so," with a duly certified transcript of the record of said cause accompanying the petition, which being seen and inspected by the court, a
44 rule is awarded to be directed to the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, returnable to the 10th day of the next regular term of this court, to be held in Charleston, in the county of Kanawha, requiring him to show cause, if any he can, why a peremptory writ of mandamus requiring him to proceed with the trial of said cause should not issue. And it is further ordered that service of a duly attested copy of this order shall be considered service of the rule aforesaid, and that a copy of this order be served upon the Chesapeake and Ohio Railway Company.

A copy from the record.

Attest:

O. S. LONG, *Clk*

*Notice.*

To A. E. White, adm'r of John D. White, deceased:

You are hereby notified that on the 10th day of January, 1883, we shall apply to Hon. John J Jackson, judge of the district court of the United States for the district of West Virginia, at his office in Parkersburg, in said district, for a preliminary order of injunction inhibiting, restraining, and enjoining you, your attorneys, and agents from proceeding any further with the application for a peremptory writ of mandamus in the supreme court of appeals of West Virginia, or elsewhere, requiring the judge of the circuit court of Greenbrier county, West Virginia, to proceed with the trial of a certain action in which you are plaintiff and the Chesapeake and Ohio Railway Company defendant, or in any other way to secure a trial of the action aforesaid in the circuit court of Greenbrier county.

CHESAPEAKE AND OHIO RAILWAY CO.,
*By Counsel.*
WM. H. HOGEMAN, *Att'y for C. & O. R'w'y Co.*

Said notice was endorsed as follows:

45 WEST ———, *Greenbrier Co.*, } *To wit:*

W. S. Rodes, being duly sworn, says: That on the 5th day of January, 1883, he delivered a true copy of the within notice to A. E. White, adm'r of J. D. White, dec'd.

W. S. RODES, *A.*

Subscribed and sworn to before me, this 5th day of January, 1883.
QUIN MORTON, *Justice.*

The following is a copy of the bond required in the order of injunction and given by the complainant in this cause, to wit:

*Bond.*

Know all men by these presents, that we, the Chesapeake and Ohio Railway Company, principal, and Wm. Hogeman, surety, are held and firmly bound unto the United States of America in the just and full sum of one thousand (1,000) dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents. Sealed with our seals and dated this 12th day of January, 1883.

The condition of the above obligation is such that, whereas, the above-named Chesapeake and Ohio Railway Company has obtained from the judge of the district court of the United States for the district of West Virginia an injunction restraining, inhibiting, and enjoining A. E. White, administrator of J. D. White, deceased, his agents and attorneys, from proceeding any further with the application for a peremptory writ of mandamus in the supreme court of appeals of West Virginia, or elsewhere, requiring the judge of the

circuit court of Greenbrier county, West Virginia, to proceed with the trial of a certain action brought by A. E. White, adm'r of J. D. White, deceased, as plaintiff, against the Chesapeake and Ohio Railway Company, as defendant, or in any other way to secure a trial of the said action in the circuit court of Greenbrier county,
46 West Virginia: Now, therefore, if the said Chesapsake and Ohio Railway Company will pay all costs and damages that may be incurred or sustained by A. E. White, administrator, as aforesaid, in case the said injunction shall be dissolved, then this obligation to be void, else to remain in full force.

[L. S.] CHESAPEAKE AND OHIO RAILWAY CO.,
By WM. H. HOGEMAN, *Ass't Counsel* [SEAL.]
WM. H. HOGEMAN. [SEAL.]

Taken and acknowledged before me, January 12th, 1883.
Teste: JASPER Y. MOORE,
*Clerk D. C. U. S. Dist. W. Va., by Henry C. McWhorter, Deputy Clerk of said Court.*

Endorsed: Filed January 12, 1883. Teste: Jasper Y. Moore, clerk.

And thereupon a subpœna in chancery was issued from the clerk's office of said court in said cause, which subpœna, together with the order of injunction entered therein, and the return of the marshal, is in the words and figures following, to wit:

The President of the United States of America to A. E. White, administrator of J. D. White, deceased:

We command you that on the first Monday in March next, at rules to be held in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, laying all other matters and excuses aside, you do cause an appearance to be entered for you in the said court to a bill in chancery filed against you by Chesapeake and Ohio Railway Company, a citizen and inhabitant of the State of ———, and that you do answer concerning such things as shall then and there be alleged against you, and observe what the said court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process of contempt as the said court shall award.
47 Witness the Hon. John J. Jackson, judge of the said court, at Charleston, this 12th day of January, A. D. 1884, and in the 107th year of the Independence of the United States of America.
Teste:
[L. S.] JASPER Y. MOORE,
*Clerk District Court U. S., District W. Va.*

*Memorandum.*

The defendant is to enter his appearance in the suit mentioned in the foregoing writ, in the clerk's office therein mentioned, on or be-

fore the day on which the said writ is returnable; otherwise the bill will be taken *pro confesso*.

Teste:

JASPER Y. MOORE,
*Clerk D. C. U. S., Dist. W. Va.*

Endorsed: The within-named defendant, his attorneys and agents, are inhibited, restrained, and enjoined, until otherwise ordered, in the within-mentioned cause, from proceeding any further with the application for a peremptory writ of mandamus in the supreme court of appeals of West Virginia, or elsewhere, requiring the judge of the circuit court of Greenbrier county, West Virginia, to proceed with the trial of a certain action described in the bill in this cause, brought by A. E. White, administrator of John D. White, deceased, as plaintiff, against the Chesapeake and Ohio Railway Company as defendant, or in any other way to secure a trial of the said action in the circuit court of Greenbrier county, West Virginia. Bond and security given as required by the order of injunction. Teste: Jasper Y. Moore, clerk.

*Return of Marshal.*

Executed the within writ on A. E. White this the 16th day of January, 1883, by delivering to said White a true copy of the same.

G. W. ATKINSON,
*U. S. Marshal,*
By A. C. LIGGETT,
*Special Dep'ty.*

48 I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, certify that the foregoing is a true transcript of the record and proceedings of a chancery cause pending in my said court at Charleston, wherein the Chesapeake and Ohio Railway Company is plaintiff and A. E. White, administrator of John D. White, is defendant, as it now appears in my said court.

In witness whereof I have hereunto subscribed my name and affixed the seal of my said court, at Charleston, this 23d day of January, 1883, and in the 107th year of the Independence of the United States.

Teste:

JASPER Y. MOORE,
*Clerk D. C. U. S., D. W. Va.*

District court United States, district West Virginia, Charleston, West Va.

(Endorsement:) D. C. U. S., D. W. Va. Chesapeake & Ohio R'w'y Co. *vs.* A. E. White, adm'r of J. D. White. Ch'y. Transcript of record. "A." Filed Jan'y 24, 1883. Attest: O. S. Long, cl'k.

(Fee for transcript, $11.75.)

And on another day, to wit, on the 5th day of February, 1883, the following order was entered:

49 *Order of Supreme Court of Appeals.*

A. E. WHITE, Adm'r of John D. White, Deceased, Petitioner,
*vs.*
Hon. HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, Defendant.

Upon a petition for a writ of mandamus.

It appearing to the court, in the answer of the Chesapeake and Ohio Railway Company to the rule heretofore issued in this cause, filed on the 20th day of January, 1883, and sworn to by W. H. Hogeman, Esq., an attorney practicing in this court, and in Exhibit "A" accompanying said answer, that the judge of the district court of the United States for the district of West Virginia has, among other things, enjoined the said Andrew E. White, administrator of John D. White, deceased, from prosecuting his petition for a writ of mandamus in this court, and that said process of injunction has been served upon the said Andrew E. White, administrator as aforesaid, and it further appearing from the record of said injunction cause in the said district court of the United States for the district of West Virginia, filed with said answer as Exhibit "A" aforesaid, that the said injunction was issued upon a bill filed by the said Chesapeake and Ohio Railway Company, and sworn to by W. H. Hogeman, Esq., its attorney: Now, therefore, it is considered by this court that a rule be, and the same is hereby, awarded against the said Chesapeake and Ohio Railway Company and the said W. H. Hogeman, its attorney, returnable to this court, at Wheeling, on Saturday, June 30th, 1883, requiring them, and each of them, to show cause, if any they, or either of them, can, why the said Chesapeake and Ohio Railway Company and the said W. H. Hogeman, Esq., its attorney, should not be severally fined or attached or otherwise proceeded against for a contempt of this court in attempting to obstruct the administration of justice herein; and it is further ordered that service of an attested copy of this order shall be considered service of the rule aforesaid.

A copy from the record.
Attest: O. S. LONG, *Clk.*

(Record printed March 5, 1883.)

50, 51, & 52 And on another day, to wit, on the 30th day of June, 1883, the following order was made:

*Upon a Petition for a Writ of Mandamus.*

A. E. WHITE, Adm'r of John D. White, Dec'd, Petitioner,
*vs.*
Hon. HOMER A. HOLT, Judge of the Circuit Court of Greenbrier County, and the CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendants.

The court having maturely considered the petition filed in this case

the rule issued thereon, the answer of the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, the answer of the Chesapeake and Ohio Railway Company, and the several exhibits accompanying the petition and answers aforesaid, is of opinion, for reasons stated in writing and now here filed, that the answers aforesaid are not, and neither of them is, sufficient in law. It is therefore considered by the court that a peremptory writ of mandamus be, and the same is hereby, ordered to be directed to the Hon. Homer
53 A. Holt, judge as aforesaid, requiring and commanding him to proceed with the trial of the case of A. E. White, adm'r — dec'd, against the Chesapeake and Ohio Railway Company, just as other causes on the trial docket of said circuit court are disposed of, and that the petitioner recover against the defendant, the Chesapeake and Ohio Railway Company, his costs about the prosecution of his petition in this court in this behalf expended. And it is further ordered that service of an attested copy of this order shall be considered service of the peremptory writ of mandamus aforesaid.

The written opinion of the court, referred to in the foregoing order, is as follows :

54 *Opinion by Johnson, Pres.*

A. E. WHITE, Adm'r, Petitioner,
*vs.*
Hon. H. A. HOLT, Judge, &c., and the C. & O. R'y Co., Defendant.

55 *Syllabus.*

1. Under the act of Congress of March 3rd, 1875, no case pending in a State court can be removed to a Federal court unless the application to remove it is made to the State court at or before the term at which it could be first tried and before the trial.
2. Where an action on the case is brought in a State court, and there has been a conditional judgment and writ of enquiry of damages awarded at rules, the case can be tried at the first term of the court thereafter; and where at such first term thereafter the defendant appeared and demurred to the declaration and the case was continued to the next term, and then the defendant filed his petition and bond and asked to have the case removed to the circuit court of the United States, and the State court refused to remove it because the application was too late, held, the State court properly refused to order the case removed.
3. The filing of the petition and bond cannot have the effect to *ipso facto* remove a cause from a State to a Federal court, because—
4. It is the duty of a State court, when an application is made
56 to it to remove a cause therefrom to a Federal court, to judicially pass upon all the questions involved in such application, the sufficiency of the petition and bond, and whether the surety is sufficient; whether the application is made in time, the citizenship of the parties, the amount in controversy; to hear the proof on all these questions, and then judicially decide

whether a cause for removal is made under the act of Congress, and if satisfied that the case is removable to enter an order removing it, and if satisfied that the case is not removable refuse to make such order and proceed with the case as if no application to remove had been made.

5. The facts set up in the petition should be such as, with what already appears on the record, if true, to show that the case under the act of Congress is removable. If such facts are not alleged in the petition and do not appear in the record it is the duty of the State court to enquire no further, but to refuse to order the removal of the cause. If such facts are alleged in the petition as show that, if true, the case is removable, such facts may be controverted, and the court will then hear the
57 evidence *pro* and *con* and judicially decide upon the evidence, and either enter an order removing or refusing to remove the cause to the United States court.

6. When a case is not removable and the State court has so decided, the obtaining a transcript of the record and filing it in the circuit court of the United States and docketing the *the* cause there can have no possible effect upon the jurisdiction of the State court over said cause, and it is the duty of the State court, even if notified of such docketing of the cause in the Federal court, to pay no attention thereto, but proceed with the cause as if no application to remove it had ever been made.

7. Where a State court had properly refused on application to remove a cause to the Federal court, the case not being removable, and after such refusal the petitioner obtained a record of the case and filed it in the Federal court, which docketed the case, and the said petitioner then took a copy of said order of the Federal court and filed it in the State court, and objected to that court proceeding further in the cause, and for the reason that under such circumstances the case had been docketed in the Federal
58 court the judge of the State court refused to proceed on application, the supreme court of appeals of the State will issue a mandamus to compel him to proceed with the cause.

8. This, in such a case, the supreme court of appeals will do, although the answer to the rule in the mandamus proceeding shows that a nonsuit had been entered in the Federal court, and the Federal court had enjoined the petitioner for the mandamus from prosecuting his petition in the supreme court of appeals.

9. The court of last resort of a sovereign State cannot, by a Federal court, by injunction or other process against the litigants, be deprived of its power from control-ing by mandamus the inferior courts of the State in the discharge of their duties.

59 A. E. WHITE, Adm'r,

*vs.*

Hon. H. A. HOLT, Judge, &c., and the CHESAPEAKE & OHIO RAILWAY COMPANY.

A. E. White, administrator of J. D. White, deceased, brought his

action in the case, in the circuit court of Greenbrier county, against the Chesapeake & Ohio R'y Co., to recover damages under the statute for the killing of his intestate. The summons issued Sept. 17th, 1881, returnable to Oct. rules. At Oct. rules, 1881, the declaration was filed, claiming $15,000 damages. At a circuit court held for said county, at the first term after the writ was issued, the case was regularly placed on the docket for trial. At said term, on the 10th day of Nov., 1881, the defendant, by its attorney, appeared and demurred generally to the declaration, in which demurrer the plaintiff joined. At the next term of said court, to wit, on the 18th day of April, 1882, the defendant entered a second demurrer to the declaration and "each count" thereof. An inspection of the declaration will show that it contains but a single count. At the same term the record shows the "defendant also presented his petition herein, accompanied by a bond according to the act of Con-
60 gress praying for the removal of this action to the district court of the United States for the district of West Virginia sitting at Charleston, and exercising circuit court powers; to the filing of which petition and bond the plaintiff objected, and the court takes times to consider of said objections."

On the 28th day of the same month, April, 1882, the court sustained the objections to the filing of said bond and petition, on the ground recited in its order, "for the reason that the same were not presented in time, because in the opinion of the court this term is not the first term at which this cause could be tried, and doth also refuse to remove this action, as prayed for in said petition."

The defendant excepted to the ruling and decision of the court.

The bill of exceptions sets out the petition which alleges that the matter in dispute, exclusive of costs, exceeds $500; that the controversy is between citizens of different States; that the plaintiff is a citizen of West Virginia, and the defendant is a citizen of Virginia, and prays "that the court proceed no further in the case except to make the order of removal required by law," &c. The petition is not sworn to. The bill of exceptions also sets out the bond.
61 The bill of exceptions is signed by Judge McGinnis, a judge of another circuit in the State, who was holding court for Judge Holt in his circuit.

A second bill of exceptions was also signed to the refusal to remove the cause upon the petition, and bond being again tendered after a special plea had been tendered and rejected, and after the defendant had pleaded the general issue. At the said term the cause was continued on motion of defendant. At the next term of the said court, to wit, on the 29th day of June, 1882, the following order was entered: "This day came the parties, by their attorneys, and the plaintiff moved the court to proceed with the trial of this cause; which motion the defendant resisted, upon the ground and for the reason that since the last term of this court a transcript of the record of the proceedings has been taken to the district court of the United States for the district of West Virginia, and that this cause

has been there regularly docketed, and it appearing to the satisfaction of this court that the facts thus stated are true, it doth, upon the ground and for the reason thus alleged by the defendant, and for that reason alone, decline and refuse to proceed further
62 with this case;" to which ruling of the court the plaintiff excepted.

On the 14th day of October, 1882, the said plaintiff, by counsel, presented his petition to this court, praying a writ of mandamus to be directed to the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, requiring him to proceed with the trial of said cause, or show cause why he has not done so. This court awarded the rules prayed for, which was made returnable to the tenth day of the January term, 1883. The rule was duly served on the judge, and also on the Chesapeake & Ohio Railway Co.

The judge of the circuit court in his answer, as the reason why he refused to proceed with the trial of the case, says: "He declined and refused to proceed further with said action, because it was made to appear to respondent that, notwithstanding the proceedings had in said action in the circuit court of Greenbrier county at the preceding term, a transcript of the record of said action had, prior to such motion, been filed, and said action docketed in the district court of the United States for the district of West Virginia, sitting at Charleston, and exercising circuit court powers, and because said said action was then pending in said district court. Under the circumstances the respondent was of opinion, and accordingly
63 decided, that the jurisdiction of the circuit court of Greenbrier county had ceased, and that he could proceed no farther with said action." Respondent files herewith as part of this answer a certified copy of the order of the said district court, filing therein the record of said action, and docketing said action to be further proceeded in in said court according to the act of Congress in relation to cases removed from State courts to the courts of the United States. In view of the premises respondent asks that the mandamus prayed for be denied, and the rule which has been awarded against him discharged." The said order referred to in the above answer, entered in the said United States court on the 1st day of May, 1882, omitting the caption, is as follows:

"This day came the defendant, by W. H. Hogeman, its attorney, and presented a true and complete transcript of the record of the above-entitled action lately pending in the circuit court of Greenbrier county, West Va., including therein the proceedings taken to remove said action from said circuit court to this court, and, on motion of said defendant, it is ordered that the transcript of the record aforesaid be filed, and this action docketed in this court, to be therein proceeded with pursuant to the act of Congress in such cases made and provided."

The Chesapeake & Ohio Railway Co., in its answer, re-
64 sisted the issuing of the mandamus on three grounds:

First. That "this proceeding is neither an appropriate nor available remedy under the law to accomplish the object of the petitioner in this proceeding. If the action of the honorable judge of

the circuit court of Greenbrier county, in the matters referred to in the rule aforesaid and in the petition on which such rule was awarded, was improper or erroneous, it cannot be reviewed or corrected by means of this proceeding, nor can the judge of the said circuit court, by virtue of any order, judgment, or writ which can be legally entered or awarded therein, be compelled to proceed with the trial of the action referred to in the rule aforesaid."

Second. That "the action of the Hon. Homer A. Holt, judge of the circuit court of Greenbrier county, in the action referred to in the rule aforesaid was proper and correct, and was justified by the facts and circumstances of the case. The said action had been legally removed to the district court of the United States for the district of West Va., sitting at Charleston, and exercising circuit court powers, in conformity to the act of Congress in relation to such matters, and the jurisdiction of the said district court had legally attached to said action, and that of the said circuit court of
65 Greenbrier county had ceased and determined."

Third. "For reasons set out in a bill of complaint filed by this respondent against A. E. White, administrator of J. D. White, deceased, in the district court of the United States for the district of West Va., sitting at Charleston, and exercising circuit court powers, an order of injunction has been awarded and perfected in said district court and served on A. E. White, administrator of J. D. White, deceased, and on his attorney, Alexander F. Matthews, Esq., restraining, inhibiting, and enjoining the said White, adm'r, &c., and his agents and attorney from further proceeding with the aforesaid application to your honorable court for a peremptory writ of mandamus. A complete transcript of the record of the said injunction, including therein the bill of complaint and exhibits, the order of injunction, and the process and return of service thereon endorsed, is herewith filed and made part of this answer, marked 'A.' The said injunction is undissolved and in full force, and respect and obedience thereto should be enforced, and is demanded. While this injunction remains in force it would be eminently improper to proceed further with this proceeding. In view of the premises respondent asks that the mandamus prayed for be denied and the rule discharged." Exhibited
66 with *with* the answer of the said railway co. is the record of said injunction suit, the bill in which exhibits a transcript of the record as it appeared in the State court, together with the order docketing the action in the district court of the United States and the following order entered in said action in said United States court on the 6th day of November, 1882. "This day came the defendant, by its attorney, and the plaintiff, though solemnly called, came not. Thereupon it is considered that the said plaintiff be non-suit, and that the defendant go hence without day, and that it recover against the plaintiff $500 damages for his false clamor, besides its costs in and about its defense herein expended." The bill also exhibits therewith the rule awarded by this court.

It is insisted in said bill that said action was removable; that the State court refused to remove the action, but by virtue of filing the petition and bond the case was removed, notwithstanding the de-

nial of the State court; that the def't in the action then obtained a transcript of the record, and docketed the said action in the United States court; that "on the 6th day of November, 1882, at a
67 term then in session of the said district court, at Charleston, final judgment was rendered in the said action in favor of your orator and against the defendant herein. This judgment is in full force and binding upon the parties thereto, and is the judgment of a court which had jurisdiction at the time of its rendition of both the parties thereto and the subject-matter thereof, and your orator is entitled to have the benefit thereof, and of all the advantages accruing therefrom." The bill exhibits the rule awarded by this court and proceeds: "Your orator avers that the proceedings thus far had in the supreme court of appeals, and those intended as aforesaid by the defendant herein, are without authority of law, and are in contempt and disregard of the authority and judgment of the said district court, are intended and calculated to evade the action of said district court and deprive your orator of the benefit of the judgment of said court, and are calculated to defeat the object of said judgment, which ended the controversy in said action by reopening and relitigating the said controversy in defiance of such judgment." The injunction granted on the
68 12th day of Jan., 1883, is as follows: After ruling that notice of the application therefor had been served on A. E. White, adm'r of J. D. White, deceased, "it is ordered that A. E. White, adm'r of J. D. White, deceased, his attorneys and agents, be, and they are hereby, inhibited, restrained, and enjoined, until otherwise ordered in the cause aforesaid, from proceeding any further with the application for a peremptory writ of mandamus in the supreme court of appeals of W. Va., or elsewhere, requiring the judge of the circuit court of Greenbrier county, W. Va., to proceed with the trial of a certain action described in the bill aforesaid, brought by A. E. White, adm'r of John D. White, dec'd, as plaintiff, against the Chesapeake and Ohio Railway Co., as defendant, or in any other way to secure a trial of the said action in the circuit court of Greenbrier county, West Va.," &c. This is the whole of the injunction order, except the requirement of the bond to be executed before the injunction should take effect. The bond so required was executed. Shall the mandamus prayed for issue? Are the reasons set out in the answers of the judge of the circuit court, or of the said railway co.,
69 or either of them, sufficient to prevent it? The first enquiry that should be made is, was the action of A. E. White, adm'r, &c., *vs.* The Chesapeake and Ohio Railway Co. removeable under the act of Congress?

If it was removeable at the time the petition and bond were filed, if the controversy was between citizens of different States, and the amount in dispute between the parties exceeded $500 in amount, and these requisites were made to appear in the record, and a proper petition and bond were filed in time, then the action was removeable, & this court, reviewing the judgment of the court below upon the petition for mandamus, would refuse to issue a peremptory writ of mandamus to compel the circuit judge to proceed in the trial of

a case of which he did not have rightful jurisdiction. Was this a controversy between citizens of different States? The record shows clearly that the plaintiff White was a citizen of West Virginia. This court judicially knows that the Chesapeake & Ohio Railway Co. is a corporation control-ing and operating a great line of railway traversing the entire State from east to west, and that it could do so only by operation of the laws of West Va., and it is therefore
70 a domestic corporation, and within the meaning of the judiciary act of Congress is a citizen of W. Va. The circuit court of Greenbrier county judicially knew this, and therefore knew from the face of the petition itself that the controversy was not between citizens of different States, but of the same State. This was a sufficient reason for refusing to remove the case to the circuit court of the *the* United States, although not assigned as a reason for the refusal to remove. But the said circuit court held that the application for removal came too late—that it was not made at the first term at which the case could have been tried. Is this true? The third section of the act of Congress of March 3rd, 1875, provides "that whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned, * * * shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such State court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held, &c., * * * and shall make and file therewith a bond, with good and sufficient surety, for his or
71 their entering in such circuit court * * * a copy of the record in such suit; it shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit," &c.

In Babbett *vs.* Clark, 103 U. S., 606, the Supreme Court of the United States held "that under the act of March 3rd, 1875, the case could not be removed unless the petition for removal was filed at or before the term of the State court at which the case could be first tried and before the trial." The Chief Justice said, page 612: "The act of Congress does not provide for the removal of a cause, at the first term at which a trial can be had on the issue, as finally settled by leave of the court or otherwise, but at the first term at which the cause, as a cause, could be tried. Under sec. 12 of the act of 1789, C. 20, (1 Stat., 79,) the application for removal must have been made by the defendant when he entered his appearance, but under the acts of 1866, C. 288, (14 Stat., 306,) and 1867, C. 196, (*Id.*, 538,) it might be effected at any time before trial. This was the condition of existing legislation when the act of 1875 was passed, and the language of that act shows clearly a determination on the part of Congress to change materially the time within which appli-
72 cations for removal were to be made. It was more liberal than under the act of 1789, but not so much so as in the later statutes. Under the acts of 1866 and 1867 "it was sufficient to move at any time before actual trial, while under that of 1875 the

election must be made at the first term in which the cause is in law triable."

Chap. 125, sec. 44, Code 605, provides that "if a defendant who appears fails to plead, answer, or demur to the declaration or bill, a rule may be given him to plead. If he fail to appear at the rule day at which the process against him is returned executed, or when it is returnable to a term, at the first rule day after it is so returned, the plaintiff, if he has filed his declaration or bill, may have a conditional judgment or decree *nisi* as to such defendant. No service of such decree *nisi*, or conditional judgment, shall be necessary. But at the next rule day after the same is entered, if the defendant continue in default, or at the expiration of any rule upon him with which he fails to comply, if the case be in equity, the bill shall be entered as taken for, confessed as to him, and if it be at law
73 judgment shall be entered against him, with an order for the damages to be enquired into, when such inquiry is proper."

Sec. 47 provides: "If a defendant against whom judgment is entered in the office shall, before it becomes final, appear and plead to issue it shall be set aside, unless an order for inquiry of damages has been executed, in which case it shall not be set aside without good cause. Any such issue may be tried the same term unless the defendant show good cause for a continuance."

Sec. 6 of Chap. 131, Code, p. 626, provides that: "At the next term after an order at the rules for an inquiry of damages the same may be tried and a final judgment rendered therein, unless good cause be shown for a continuance."

It has been frequently decided by the Virginia court of appeals, and our own, that the court has control over proceedings at the rules, and will correct them if erroneously taken, and such correction will not delay the trial of the case; and, also, if the defendant pleads, whatever defects appear in the rules are entirely immaterial.

A demurrer is a plea, and tenders an issue of law. The defendant demurrer is a plea, and tenders an issue of law. The defendant demurred at the first term at which he could have appeared
74 to the action. That demurrer could have been at once heard and determined, and might have ended the case. Had it been overruled, according to our practice, the case could at once have been heard and the damages ascertained, whether the defendant entered any other plea or not. He did not file his petition at that term, but the next, and clearly it was not under the decree of Babbett *vs.* Clark, *supra*, filed at the first term at which the case could be tried, and was not for this reason removable. But it is insisted that it was removed whether removeable or not, and that the State court has no voice in determining whether or not the case was removeable; that the filing of the petition and bond *ipso facto* ousted the jurisdiction of the State court, and conferred jurisdiction on the circuit court of the United States; that the removal is effected by the act of the party who chooses to file a petition and bond, and no matter whether the petition states facts necessary to show a case for removal or not; it matters not whether the bond is in form or whether the surety is sufficient, the case is removed, and the

circuit court of the United States alone can say upon a motion to remand whether the act of Congress has been complied
75 with; that therefore, although this case was clearly not removable, and the circuit court of the State so decided, and refused to give up its jurisdiction and order the removal, yet, because the attorney for the defendant, in defiance of the judgment of the court in which he was an attorney, chooses to procure a transcript of the record and file it in the circuit court of the United States, which court dockets the case, and then appears at the next term of the circuit court of Greenbrier county and objects to the cause being further proceeded in, because he has docketed the case in the Federal court, and thereby induces the State court to refuse to proceed in a case in which it had decided it had jurisdiction, this court of last resort in a sovereign State has its energies paralized by the mere act of an attorney-at-law. We can see no middle ground; either the State court has the right to judicially pass upon the question, whether by the petition and record in the State court, and by a good and sufficient bond being filed within the time required by the act of Congress, the requirements of the act which must be complied with to
76 give the right of removal to the Federal court in fact do or do not exist, or the State court has no right to pass upon those questions, and the mere act of the party filing the bond and petition, or what purports to be, at any stage of the proceedings in the State court, *ipso facto* removes the case to the circuit court of the United States, and the latter court alone has the right, upon a motion to remand, to decide whether the petition was proper, whether filed in time, whether bond and security were sufficient, and whether the facts as they appear by the record entitles the party to have his cause removed. I know a number of courts have so decided, but among them is no decision of the Supreme Court of the United States. Stewart & Cutts *vs.* Mordecai, 40 Geo., 1; St. Anthony Falls W. P. Co. *vs.* King Bridge Co., 23 Minn., 186; Herryford *vs.* The Etna Ins. Co., 42 Mo., 148; Hatch *vs.* Railway Co., 6 Blatch., 105; Fisk *vs.* Railroad Co., 6 Blatch., 362; Fisk *vs.* Union Pacific R. R. Co. & Blatch., 243; Connor *vs.* Scott, 4 Dill., 242; Cobb *vs.* Ins. Co., 3 Hughes, 452.

On the other hand, it has been held by many courts that it is the duty of the State court to whom the application for removal is made to enquire into the facts and judicially pass upon the question
77 whether, under the act of Congress, the case is removeable, and either to grant or deny the prayer of the petition. Mahone *vs.* Railroad Co., 111 Mass., 72; Bryant *vs.* Rich, 106 Mass., 180; Du Vivier *vs.* Hopkins, 116 Mass., 125; Knickerbocker Life Ins. Co. *vs.* Gorbach, 70 Penn. St., 150; Hadley *vs.* Dunlap, 10 Ohio St., 1; Wheton *vs.* Railway Co., 25 Wis., 424; Alverley *vs.* Vilas, 24 Wis., 165; The People *ex rel.* Western Trans Co. *vs.* Superior Court, 34 Ill., 356; Durr *vs.* Bates, 51 Ill., 439; Delaware R. R. Construction Co. *vs.* Railroad Co., 46 Ia., 406; Burch *vs.* Davenport & St. Paul R. R. Co., 46 Ia., 452; Crane *vs.* Reeder, 28 Mich., 527; Mabley *vs.* Judge Sup. Court, 41 Mich., 33; Atlas Ins. Co. *vs.* Byrns, 45 Ind., 133; McWhinney *vs.* Brinker, 64 Ind., 360; Blair *vs.* West Point

Manufacturing Co., 7 Nev., 146; Orosco *vs.* Saglardo, 22 Cal., 83; Clark *vs.* Opdyke, 10 Hun., 383; Carswell *vs.* Schley, 59 Geo., 19; State *ex rel.* Coons *vs.* Judge, &c., 23 La. An., 29; Hannen *vs.* B. & O. R. R. Co., 17 W. Va., 881; P., W. & Ky. R. R. Co. *vs.* B. & O. R. R. Co., 17 W. Va., —; Tunstall *vs.* Parish of Molleson, 30 La. An., 471. In Du Vivier *vs.* Hopkins, Gray, C. J., said: "We have no doubt or hesitation in affirming the order of the superior court refusing the petition for the removal of this case into the circuit court of the United States." In Mahone *vs.* R. R. Co. the same learned
78 judge said: "But in order to transfer the case from the State to the Federal court the requirements of the act of Congress must be strictly and fully complied with. It is only upon such compliance that the act declares it shall be 'the duty of the State court to accept the surety and proceed no further in the suit.' If they are not complied with the jurisdiction of the Federal court does not attach, the jurisdiction of the State court is not affected, and it is its duty to proceed with the trial or other judicial disposition of the case as if no attempt had been made to remove it." The court below in that case refused to remove the case, and its judgment was affirmed. In the case of The People *ex rel.* Trans. Co. *vs.* Superior Court there was an application for mandamus to compel the court to remove the cause; the mandamus was refused. The court said: "At the hearing of the petition the petitioner should adduce satisfactory evidence of the facts, which the act of Congress requires to have existed, to entitle him to a removal of the cause. If there is no satisfactory evidence offered of such facts it is the duty of the court to refuse the prayer of the petition. * * * As there
79 was no evidence before the court below that the plaintiffs were citizens of Ill. at the time when the suit was commenced, its refusal to order a removal of the cause was correct." In Burch *v.* Davenport & St. Paul R. R. Co. the court said: "It does not, therefore, follow that a mere filing of a petition and affidavit *ipso facto* removes the cause without regard to the character of the suit or the form or allegations of the application for removal. If the suit is not one which, under the laws of Congress, may be removed it is the duty of the State court to disregard the application for removal and proceed with the trial as though no such application had been made. In such case the petition for removal presents a question of law for the determination of the State court."

In Orosco *vs.* Tagliardo the court said: "The defendant contends that under this provision (of the act of Congress), when the petition is filed and the surety is offered, the State court can do no farther act in the case except to accept the surety and order the removal. This is not the proper construction. The court must first be fully satisfied by proper evidence that the application for removal is founded upon facts which entitle the applicant to the order, and for this purpose the court has a right to enquire into the facts
80 set forth in the petition, as well as investigate the sufficiency of the surety, and determine the matter accordingly."

In Clark *vs.* Opdyke the court said, p. 386: "The act of 1875 does not prescribe what the petition shall contain, but it provides

that when certain facts specified in the act exist a petition may be made and filed for the removal of the suit. The existence of the requisite facts must be ascertained by the court, and to that end the averments of the petitioner in regard to them may be controverted by the opposite party. Under the act of 1789, which was like that of 1875 in this particular, affidavits or other proofs were frequently received to controvert the petition." The court cites on this point Anderson *vs.* Manufactor's Bank, 14 Abb., 436; Fisk *vs.* The Chicago, Rock Island & Pacific R. R. Co., 3 Abb., N. S., 453; Smith *vs.* Butler, 38 How. Pr., 192; New York Piano Co. *vs.* New Haven Steamboat Co., 2 Abb., N. S., 357.

In Caswell *vs.* Schley the court said: "When a court in which a cause is pending is called on to yield its jurisdiction on statutory conditions, said to appear on the face of certain documents presented to it, it must inspect the documents and determine whether
81 the conditions appear or not. How else is it to know whether to retain the case or part with it—whether to grant the application or refuse it—whether to treat the case as still pending or out of court? If a court is to know the situation of its own business, and how to order its proceedings in reference thereto, it cannot decline the duty of deciding whether a given case is a part of its business or not when the question is properly made before it. The scheme of removal ordained by Congress is open and public. It is by petition. It contemplates a taking with leave and not furtively by a sort of statutory larceny. The State court is to know of the proceedings for removal and see that they are such as the act prescribes. Where they conform to the act the court has no right or power to retain the case, and where they fail in any essential particular it has no right or power to send the case away or order it removed."

We have reviewed these authorities to show what construction the courts of last resort of a large number of the States have put upon the removal acts of Congress with regard to the right of the State court to investigate and judicially pass upon the facts
82 necessary to entitle a party to a removal of his cause before it is compelled to relinquish its jurisdiction. But in full accord with these State authorities are the decisions of the Supreme Court of the United States. In this particular, as it has been held by the Supreme Court of the United States, there is no essential difference between the act of 1789 and 1875. In Gordon *vs.* Longert, 16 Pet., 97, there was a writ of error to the supreme court of Kentucky. The State inferior court had denied the prayer of the petitioner for a removal of the case, and the judgment was affirmed by the supreme court of the State. Although this decision was rendered in 1842 it is the first case upon the subject of removal of causes to be found in the reports of the Supreme Court of the United States.

After quoting the twelfth section of the act of 1789, on p. 102, the court, by Mr. Justice McLean, says: "Under the above section it must be made to appear to the satisfaction of the State court that the defendant is an alien, or a citizen of some other State than that

in which the suit is brought; and that the matter in controversy, exclusive of costs, exceeds the sum of five hundred dollars."

Kanouse *vs.* Martin, 15 How., 198, was also decided on writ of
83 error to the State court, and the court, page 208, by Mr. Justice Curtis, said: "Where by an inspection of the record it appeard to the court of common pleas (the State court) that the sum demanded in this action was one thousand dollars, and when it further appeared that the plaintiff was a citizen of the State of New York, and the defendant of the State of New Jersey, and that the latter had filed a proper bond, with sufficient surety, a case under the twelfth section of the judiciary act was made out, and according to the terms of that law it was 'then the duty of the State court to accept the surety and proceed no further in the cause;' not his duty to give up jurisdiction on the filing of a petition merely, and a bond, whether sufficient or insufficient, but to look at the facts, and if a case for removal was made, and a proper bond filed, with sufficient surety, of all of which he was the judge, then, and not until then, was it his duty to relinquish his jurisdiction." Chief Justice Waite, with whom concurred Mr. Justice Davis, in his dissenting opinion in Insurance Co. *vs.* Moore, 20 Wall., 458, said: "The State court had jurisdiction to try the question of citizenship upon the peti-
84 tion to transfer. Upon the facts I think it was authorized to find that the company was for all the purposes of that action a citizen of Wisconsin, and refuse the order of removal." The right of the state Court to enquire into the citizenship of the petitioner was not questioned in the opinion of the court. In Fashnacht *vs.* Kaul, 23 Wall., 416, it was held that "the refusal of the State court to grant a removal under the act of Congress not having been excepted to, and that matter not having been involved in what was before the supreme court (of the State), its judgment cannot be held to have embraced it, nor indeed anything but the matter of the dissolution of the injunction, a matter which involved no Federal question. For this reason the writ of error was dismissed.

In Kimball *vs.* Evans, 93 U. S., 320, Waite, C. J., said: "It is clear we have no jurisdiction in this cause. The judgment of the supreme court is not the final judgment in the suit. It disposes finally of one of the questions involved in the suit, but not of the suit itself. The suit is still pending in the district court, and it is not impossible that the parties now complaining may be satisfied with the judgment which they may in the end be able to
85 secure in the State courts. If not, after a final judgment has in fact been rendered by the highest court of the State in which a decree in the suit can be had, the case may be again brought here for a determination of the questions arising upon the petition for removal."

In Railway Company *vs.* Ramsey, 22 Wall., 328, the Court, through the Chief Justice, said: "To obtain the transfer of a suit the party desiring it must file in the State court a petition therefor and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the

suit when transfer-ed. The one necessarily includes the other. If upon the hearing of the petition it is sustained by the proof the State court can proceed no further. In Bible Society *vs.* Grove, 101 U. S., 611, it was held that 'the courts of the United States are not required to take any suit until in some form their jurisdiction is made to appear of record.' That jurisdiction can only be made to appear by the record, as it comes from the *the* State court. If it does not so appear, although the State court has entered an order
86 of removal, the law requires the Federal court on motion to remand it. If the State court could not investigate the jurisdictional facts it would be within the power of any litigant, even though he might be the clerk of such State court, born and reared in the State, upon being sued in the State court by a resident of the same State, to file his petition, stating that he was a citizen of a different State, that the amount in controversy, exclusive of costs, exceeded $500.00, and tender a bond, and thus remove the case to a Federal court, although the State court judicially knew by the office he held that he was in fact a citizen of said State, and in this manner thus produce to the Federal court a record of the case showing on the face thereof that the case was removable. The jurisdictional facts must of necessity be enquired into somewhere. It is not proper, as we have seen from Railway *vs.* Ramsay, for the circuit court of the United States to do it, because as to that he takes the record as it comes from the State court, and if the State court cannot investigate the jurisdictional facts it necessarily follows that both courts are at *at* the mercy of an unscrupulous suitor, who states falsehoods in his petition without the fear of the penalties of perjury be-
87 cause he is not required to swear to the petition."

In Ins. Co. *v.* Pechner, 95 U. S., 183, in which the court of appeals of New York affirmed the decree of the court below refusing an application to remove the case, the Supreme Court held that " this right of removal is statutory. Before a party can avail himself of it he must show upon the record that his case is one which comes within the provisions of the statute. His petition for removal when filed becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not in law shown to the court that it cannot proceed further with the cause. Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended. * * * The court (State court) had the right to take the case, as made by the party himself, and not enquire further. If that was not sufficient to oust the jurisdiction there was no reason why the court might not proceed with the cause. We think, therefore, the court of appeals did not err in its decision." To the same effect is Armory *vs.* Armory, 95 U. S., 186.

88 In the "Removal Cases," which arose under the act of 1875, the court, by Waite, C. J., said :

" We fully recognize the principle heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner

can remove the cause as a matter of right." 100 U. S., 474. To the same effect is Babbitt *vs.* Clarke, 103 U. S., 610.

In Railroad *vs.* Koontz, 104 U. S., 5, the court held "that the jurisdiction is changed when the removal is demanded in proper form and a case for removal is made. * * * The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the State court forces the petitioner to a trial and judgment and the highest court of the State sustains the judgment, he is entitled to a writ of error to this court if he saves the question on the record."

How could he save the question on the record unless the court had judicially passed upon it and given its judgment thereon?

National Steamship Co. *vs.* Tugman, 106 U. S., was a writ of error to the court of appeals of New York. In that case the court, by Mr. Justice Harlan, said: "Where the State court adjudged that
89 it had authority to proceed the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest, at subsequent stages of the trial, against its exercise of jurisdiction. Indeed such a course would scarcely have been respectful to the State court after its ruling on the point of jurisdiction had been made." A learned writer has aptly said: "If the court cannot be deprived of its jurisdiction until it is judicially informed that its power has been suspended, then it cannot be so deprived until it judicially ascertains the truth of the assumed facts by which that suspension has been affected. It cannot judicially know that the jurisdictional averments of the petition are true without a judicial inquiry, and it can make no such inquiry without the right to controvert said averments. The State court unquestionably had the rightful jurisdiction of the cause before the filing of the petition, and unless the averments of the petition are true its jurisdiction continues, because a mere fiction or falsehood cannot transfer its jurisdiction. Then must the court which con-
90 fessedly has the rightful jurisdiction, upon a mere suggestion of facts which may be true or false, surrender its jurisdiction to a court which can have jurisdiction only in the event said facts happen to be true. If this be so, then this absurdity follows: The court which has jurisdiction must decline to exercise it until a court which may have none may see proper to decline it. Such a construction of the statute is not only unreasonable, but is in conflict with the most elementary principles of constitutional government." The circuit court of Greenbrier not only had the right to decide the question whether the action was removable, but, as we have found, decided it correctly. The filing of the transcript and docketing of the case in the Federal court, after the filing of the petition and bond, of course did not and could not remove the case.

The proper course for the defendant to have pursued, when the State court refused the prayer of its petition, was to submit to the judgment of the said court and to appeal to this court, and, in case it was aggrieved by its judgment upon such appeal, to apply for a

writ of error to the Supreme Court of the United States,
91 which alone can finally decide the question.

The proposition that an inferior Federal court can sit in review of the judgment of a State court cannot upon reason or authority be successfully maintained; and had the defendant pursued the course indicated, it would have pursued the — course, and, in our opinion, the only proper course, which was taken in all such cases until the case of the Railroad *vs.* Whiton, 13 Wall., 270, decided in 1871. Since then, when State courts have denied the prayer of the petitioner for removal, in a number of instances the petitioners have taken transcripts and docketted the cases in the Federal court, and the circuit courts of the United States have taken jurisdiction, and from said circuit courts, as well as from State supreme courts, the same cases have gone to the Supreme Court of the United States. Of this class was the "removal cases," 100 U. S. and Bondman *vs.* Watson, 103 U. S., 281. In 1864, Judge Drummond, of the 7th circuit, in Hough *vs.* Transportation Company, 1 Biss., 425, said, in speaking of the acts of Congress: "They have given certain legal discretion to the judge of the State court, not that thereby the defendant is deprived of the right which the statutes give him,
92 but that it is competent for the appellate State court to redress the wrong, if wrong has been done to the defendant, by correcting the error of the State court in which the suit was brought. If the highest court in the State will not do that, the defendant has his remedy by writ of error to the Supreme Court of the United States, which would have jurisdiction in such case. All the cases in which the question has arisen have gone to the Supreme Court of the Untted States in this way, and the error of the State court, where any existed, has been rectified in the Supreme Court." This course would preserve the harmony of our dual system of government, and prevent these unhappy conflicts of jurisdiction, which are so frequent to-day between the State and Federal courts. The recognition of the right of a party to have his cause pending in a State court and Federal court at the same time, and one court deciding one way and the other court just the opposite, and each court using its power to enforce its judgments and decrees by injunctions, processes of contempt, and the like, produces the utmost confusion, and tends directly to anarchy. Whether the court has power by appropriate process to enforce its judgments and decrees ought not to
93 depend upon a final decision of the Supreme Court of the United States rendered years after a party has been punished for a contempt of the process of either a State or Federal court. Suppose the State court, which has passed judicially upon the question whether the case was removeable and denied the right to remove, goes on with the case and enters final judgment, which the Supreme Court of the United States says it may rightfully do if the case was not removeable, and the party has, notwithstanding, taken a transcript and docketed his case in the Federal court, and that court takes jurisdiction and goes on to final judgment, and its judgment is the reverse of the judgment in the State court, and processes of contempt are resorted to by both courts, and the parties respect-

ively are severally punished, one by the State court and the other by the Federal court, and writs of error have been taken from the Supreme Court of the United States, and that court decides that the case was not removeable, will the party thus punished have any redress? Or, if it is decided that the case was removeable, what redress has the other party for what he has suffered in his
94 person? This state of things ought not to exist in a monarchy, much less in a free government. It having been many times held by the Supreme Court of the United States that before the State court is compelled to give up its jurisdiction it must be judicially informed that its power over the case has been suspended, then that judgment, like any other, ought to stand until it is reversed by appellate proceedings, and when so reversed all orders made after a proper application for removal has been made and a case for removal is shown to exist shall be declared null and void by such appellate court. Hadly *vs.* Dunlap, 10 Ohio St., 1.

But it has been uniformly held by the Supreme Court that the jurisdiction of the State is in no case taken away unless the case at the time of the application was removeable, and that the State court must pass upon that question. In this case it did pass upon the question and denied the prayer of the petition, and we have found that the case was not removeable; therefore the jurisdiction of the State court was not ousted, and the docketing of the action in the Federal court could not remove a non-
95 removeable case; therefore there is no force in the answer of the judge of the circuit court. But it is insisted by the Chesapeake and Ohio Railway Company in its answer that proceedings by the parties in the application for the mandamus were enjoined. We have no hesitation in saying that the Federal court had no power to enjoin the parties in this case. If it had then it can by its process of injunction take away from this court its right and authority by mandamus to control the inferior State courts in the discharge of their duties. If that is true the whole State is within the power of the inferior Federal courts. Such a position cannot for a moment be tolerated. This is the boldest attempt to deny to an adversary, by professional ingenuity, the right to have his case tried in any court that has ever been brought to our notice. He is sued in a State court; he makes an application to remove the case to the Federal court; it is denied; he then on his own motion obtains a continuance, then procures a transcript of the record, and dockets the action in the Federal court. At the next term of the circuit court he flaunts in the face of the State judge the order
96 of the Federal court docketting the case there. The State court refuses to proceed, and, after a rule in mandamus proceedings to compel the State judge to proceed was issued, goes to the circuit court of the United States and has the plaintiff called and a judgment of nonsuit entered, and then files his bill for an injunction setting up said nonsuit as a judgment, which ends the litigation, and procures an injunction to restrain the parties from proceeding in the supreme court of appeals of West Virginia for a mandamus to compel the judge of the State court to proceed with the case. This is a hereto-

fore unheard- of proceeding. There is no reason or authority to sustain it unless some we have cited authorize a party to do as he pleases with any cause to which he is a party. For this extraordinary proceeding the counsel for the railway co. relies on French, Trustee, *vs.* Hay, 22 Wall., 250, and Dietzsch *vs.* Huidekoper, 103 U. S., 494. There is no authority here for such a proceeding, nor any countenance given to such an idea. In French, Trustee, *vs.* Hay the suit was brought in the State court, and after a decree had been entered in the case by that court under one of the acts of Congress the State court removed the case to the circuit court of the United States.

97 There was no dispute as to its being a removeable case. The Federal court set aside that decree, and after this the party in whose favor the decree in the State court was sent a transcript of the decree to Philadelphia, and brought suit upon it. The person of said party being within the jurisdiction of the court, it enjoined him from prosecuting said suit. In the other case the Supreme Court of the United States held that the cause was removeable, and the circuit court of the United States had jurisdiction to render the judgment. There is no judgment here that could, under any circumstances, be regarded as settling the rights of the parties. A nonsuit settles nothing. It does not prevent the party from bringing another suit for the same cause of action.

There is nothing in either of the answers to the rule that justified the judge of the circuit court of Greenbrier county in refusing to proceed to try said case. He had jurisdiction and should have exercised it. The Supreme Court of the United States has recognized mandamus as the appropriate remedy in such case. *Ex parte* Schollenbarger, 96 U. S., 369. A peremptory mandamus, according to the prayer of the petition, is awarded.

98 On this day, to wit, on the 30th day of June, 1883, the following order was made:

THE STATE OF WEST VIRGINIA, Plaintiff,
*vs.*
THE CHESAPEAKE AND OHIO RAILWAY COMPANY and W. H. HOGEMAN, Esq., its Attorney, Defendants.

Upon a rule against the said defendants to show cause, if any they can, why they should not be severally fined or attached, or otherwise proceeded against for a contempt of this court:

This day came the defendants, by W. J. Robertson, their attorney, and, for reasons appearing to the court, it is ordered that the rule heretofore issued in this case be enlarged until Saturday, the 29th day of September next.

99 I, O. S. Long, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing is a full and complete transcript of proceedings had in the case of A. E. White, adm'r of John D. White, dec'd, against the Hon. Homer A. Holt,

judge of the circuit court of Greenbrier county, as fully as the same exists in my office.

Given under my hand and the seal of our said supreme court of appeals, this 9th day of July, 1883.

[Seal of Supreme Court of Appeals, West Virginia.]

O. S. LONG.

100 To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, and the Chesapeake and Ohio Railway Company, a corporation, by William H. Hogeman, Esquire, attorney, and complain that in the record and proceedings, and also in the rendition of a judgment in a suit between A. E. White, administrator of John D. White, deceased, plaintiff or petitioner, and Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, and the Chesapeake and Ohio Railway Company, defendants, in the supreme court of appeals of the State of West Virginia, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on the 30th day of June, 1883, in said suit, wherein is drawn in question the validity of a treaty or statute for an authority exercised under the United States, and the decision is against their validity, all which appears in the record and proceedings in said suit, manifest error hath happened to the great damage of the said Chesapeake and Ohio Railway Company.

Wherefore the said Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, and the Chesapeake and Ohio Railway Company, pray for the allowance of a writ of error
101 and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WM. H. HOGEMAN, *Attorney.*

Allowed.

SAM'L BLATCHFORD,
*Associate Justice of the Supreme Court of the United States.*

102 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals of the State of West Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. E. White, administrator of John D. White, deceased, plaintiff or petitioner, and Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, and the Chesapeake and Ohio Railway Company,

defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
103 or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the Chesapeake and Ohio Railway Company and Homer A. Holt, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-first day of July, in the year of our Lord one thousand eight hundred and eighty-three.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—

SAM'L BLATCHFORD,
*Associate Justice of the Supreme Court of the United States.*

104 In obedience to the within writ of error, a copy whereof was lodged in my office for A. E. White, administrator of John D. White, deceased, on the 25th day of July, 1883, at which time also the within original came to hand, I herewith send to the Supreme Court of the United States the record and proceedings therein referred to, and annex thereto the assignment of errors, a prayer for reversal and a citation to A. E. White, administrator as aforesaid.

In witness whereof I have hereunto affixed my name as clerk of the supreme court of appeals of West Virginia, this 25th day of July, 1883.

O. S. LONG, *Cl'k.*

105 The United States of America to A. E. White, administrator of John D. White, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Weft Virginia, wherein the Chesapeake and Ohio Railway Company and Homer A. Holt are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, one of the associate justices of the Supreme Court of the United States, this eighteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

SAM'L BLATCHFORD.

106 On this 25th day of July, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared W. S. Rodes before me, the subscriber, a notary public in and for the county of Greenbrier, and State of West Virginia, and makes oath that he delivered a true copy of the within citation to A. E. White, administrator of John D. White, deceased, on the 24th day of July, 1883.

W. S. RODES,
*Agent C. & O. R'y.*

Sworn to and subscribed the 25th day of July, A. D. 1883.

ROB'T C. RODES,
*Notary Public.*

107 Know all men by these presents, that we, The Chesapeake and Ohio Railway Company, a corporation, principal, and C. P. Huntington, of the city of New York, are held and firmly bound unto A. E. White, administrator of John D. White, deceased, in the full and just sum of twenty thousand dollars, to be paid to the said A. E. White, administrator as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a supreme court of appeals of the State of West Virginia, in a suit depending in said court between A. E. White, administrator of John D. White, plaintiff or petitioner, and Honorable Homer A. Holt, judge of the circuit court of Greenbrier county, West Virginia, and the Chesapeake and Ohio Railway Company, defendants, judgment was rendered against the said defendants, and the said The Chesapeake and Ohio Railway Company and the said Homer A. Holt having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. E. White, administrator of John D. White, deceased, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next: